

**U.S. Department of Labor**

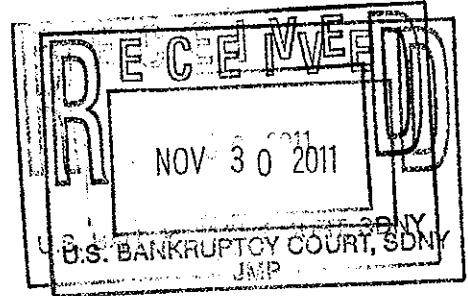
Office of the Solicitor  
Washington, D.C. 20210



November 29, 2011

**UPS OVERNIGHT DELIVERY**

Honorable James M. Peck  
United States Bankruptcy Judge  
United States Bankruptcy Court  
One Bowling Green  
New York, NY 10004



Re: In re Lehman Brothers Holdings Inc. et al, 08-13555 (JPM)  
(Jointly Administered)

Dear Judge Peck:

We write to express the disagreement of the Secretary of the United States Department of Labor to certain portions of the Debtors' proposal in their letter dated November 23, 2011 (the "Letter") in response to Your Honor's request at the November 16 hearing that "what amounts to a funded lawyer" be provided to the participants and beneficiaries of the LBHI Plan (the "Participants"). Hearing Transcript at page 56, line 2. A copy of the transcript is attached for the Court's convenience.

In satisfaction of Your Honor's request, the Debtors propose to (i) seek and pay for the retention of special counsel to prepare an analysis as to which, if any, of the retirees and long term disabled (collectively, the "Retirees") are vested (the "Vested Rights Analysis"), and (ii) have LBHI provide the Retirees "with reports regarding the status of their medical benefits" (the "LBHI Report Proposal"). Letter at 2. The Vested Rights Analysis appears to be a viable approach. The Secretary would like to see the retention application and also be provided with a copy of the analysis. Also, as Your Honor suggested at the hearing, the Secretary believes that the universe of the analysis should be expanded to include active employees as some may have vested rights to retiree medical benefits.

The LBHI Report Proposal, however, appears to fall short of what the Court requested. First, it appears that LBHI has been the primary provider of information to the

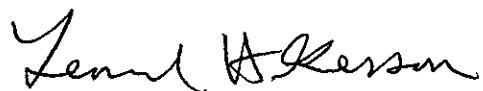
Retirees in the past. As the many responses to the Motion reflected considerable confusion as to the status and rights of the Retirees, the LBHI Report Proposal does not explain how it will address these past failures.

We understand that it may be too late in the case for the appointment of a retiree committee pursuant to section 1114, but respectfully suggest that a basic goal of section 1114 may be accomplished by the appointment of special counsels pursuant to Your Honor's powers under section 105(a) of the Bankruptcy Code. For example, section 105(a) has been used to extend the reach of section 362(a) to non-debtors, where appropriate, e.g., SMF Realty Co. v. Consolini, 903 F.Supp. 656, 662 (S.D.N.Y. 1995); to appoint a legal representative for future claimants in asbestos cases, e.g., In re Johns-Manville Corp., 36 B.R. 743, 757 (Bankr. S.D.N.Y. 1984); and to appoint special counsel to assist a patient care ombudsman. In re Synergy Hematology-Oncology Medical Associates, 433 B.R. 316, 319 (Bankr. C.D. Cal. 2010). By these means, "those separate classes [current employees, retirees and those on long term disability] can be advised in a thoughtful and understandable way as to what their rights are." Hearing Transcript at page 56, lines 4 – 6.

In the alternative, ERISA and the terms of the VEBA would allow the VEBA trustee herself at the cost of the Debtors to retain special counsels for this purpose. Because these special counsels may be representing different classes of participants and beneficiaries as opposed to the VEBA, it would be problematic for the VEBA to pay for their representation.

We will be available, if Your Honor has any questions on these matters for which we may be of assistance.

Respectfully submitted,



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cc: Richard Krasnow, Esq.

Ms. Carol Rado, VEBA Trustee

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UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case Nos. 08-13555 (JMP) (Jointly Administered)

5 08-01420 (JMP) (SIPA)

7 In the Matter of:  
8 LEHMAN BROTHERS HOLDING  
9 Debtors.

11 In the Matter of:

12 LEHMAN BROTHERS INC.,  
13 Debtor.

20 November 16, 2011

21 10:09 AM

22

23 | B E F O R E :

24 HON. JAMES M. PECK

25 U.S. BANKRUPTCY JUDGE

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1

2 HEARING re Motion of Colorado Plaintiffs Authorizing 2004  
3 Examination of Debtors [ECF No. 15200]

4

5 HEARING re Motion of Colorado Plaintiffs for Relief from the  
6 Automatic Stay [ECF No. 15201]

7

8 HEARING re Debtors' Motion to Establish Procedures for the  
9 Consensual Amendment and Assumption of Certain Non-Terminated  
10 Prepetition Derivatives Contracts [ECF No. 21297]

11

12 HEARING re Debtors' Motion Pursuant to Section 105(a) of the  
13 Bankruptcy Code and Bankruptcy Rule 9019 for Approval of a  
14 Settlement and Compromise with Danske Bank A/S [ECF No. 21298]

15

16 HEARING re Joint Motion of Lehman Brothers Holdings Inc. and  
17 James W. Giddens, as Trustee for Lehman Brothers Inc., Pursuant  
18 to Sections 105(a) and 363 of the Bankruptcy Code and Rule 9019  
19 of the Federal Rules of Bankruptcy Procedure (i) for  
20 Authorization and Approval of a Stock Purchase Agreement  
21 Regarding the VEBA and (ii) for Authorization and Approval of a  
22 Settlement Regarding the Same [Case No. 08-13555, ECF No. 21109  
23 and Case No. 08-01420, ECF No. 4654]

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2 HEARING re The Providence Funds' Motion for an Order Settling  
3 Hearing Date and Establishing Discovery and Briefing Schedule  
4 or, in the Alternative, for a Status Conference [LBI ECF No.  
5 4678]

6

7 HEARING re Joint Motion of Lehman Brothers Holdings Inc. and  
8 James W. Giddens, as Trustee for Lehman Brothers Inc., Pursuant  
9 to Sections 105(a) and 363 of the Bankruptcy Code and Rule 9019  
10 of the Federal Rules of Bankruptcy Procedure (i) for  
11 Authorization and Approval of a Stock Purchase Agreement  
12 Regarding the VEBA and (ii) for Authorization and Approval of a  
13 Settlement Regarding the Same [Case No. 08-13555, ECF No. 21109  
14 and Case No. 08-01420, ECF No. 4654]

15

16 HEARING re Uvino v. Lehman Brothers Holdings Inc. [Case No. 10-  
17 05428]

18

19 Adjourned Matters:

20 Motion of Official Committee of Unsecured Creditors for  
21 Reconsideration of Court's September 17, 2008 Interim Order (i)  
22 Authorizing Debtor to Obtain Post-petition Financing Pursuant  
23 to Sections 363 and 364 of Bankruptcy Code and (ii) Granting  
24 Liens and Superpriority Claims to Postpetition Lenders Pursuant  
25 to Section 364 of Bankruptcy Code [ECF No. 434]

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1

2 Motion of Fativa, Inc., et al. to Compel Immediate Payment of  
3 Postpetition Administrative Expense Claims [ECF No. 7102]

4

5 Motion of Fidelity National Title Insurance Company to Compel  
6 Compliance with Requirements of Title Insurance Policies [ECF  
7 No. 11513]

8

9 Motion of Jason T. Taylor for Relief from the Automatic Stay  
10 [ECF No. 14377]

11

12 Motion of Phillip Walsh for Relief from the Automatic Stay [ECF  
13 No. 14571]

14

15 Motion of Giants Stadium LLC for Leave to Conduct Discovery of  
16 the Debtors Pursuant to Federal Rule of Bankruptcy Procedure  
17 2004 [ECF No. 16016]

18

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25 Transcribed by: Sharona Shapiro

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PROCEEDINGS

2

THE COURT: Be seated. Good morning.

3

MS. MARCUS: Good morning, Your Honor. Jacqueline  
Marcus of Weil Gotshal & Manges on behalf of Lehman Brothers  
Holdings Inc. and its affiliated debtors.

6

Items number 1 and 2 on the agenda this morning are  
related to each other. They are the motions of the Colorado  
plaintiffs for Rule 2004 examinations and for relief from the  
automatic stay. The debtors objected to both motions several  
months ago and since then have been trying to reach a  
consensual resolution.

12

The Colorado plaintiffs are involved in litigation in  
state court in Colorado. They allege that they have claims  
relating to the design, construction or maintenance of a golf  
course owned by debtor LB Rose Ranch LLC.

16

The debtors and the Colorado plaintiffs have entered  
into a stipulation, subject to the approval of the Court, which  
provides as follows -- I have a copy of it, Your Honor, if I  
may approach.

20

THE COURT: Please approach. Thank you.

21

MS. MARCUS: The automatic stay in the cases of LBHI  
and Rose Ranch will be modified solely to permit the Colorado  
plaintiffs to assert any and all claims relating to the design,  
construction or maintenance of the golf course and prosecute  
such claims against LBHI, Rose Ranch and/or their insurers in

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1 order to recover damages from the insurance policies and  
2 proceeds.

3 They will also be granted relief to settle the  
4 Colorado litigation with the insurers for LBHI or Rose Ranch,  
5 and to execute or collect upon any judgment rendered in their  
6 favor in the Colorado litigation against the insurance policies  
7 and proceeds without further court approval.

8 The automatic stay with respect to PAMI Statler  
9 remains unmodified, and the Colorado plaintiffs have agreed not  
10 to assert any claims against LBHI or recover any amounts in  
11 excess of the insurance proceeds from LBHI.

12 There is, however, a reservation of rights pursuant  
13 to which the Colorado plaintiffs reserve their right to seek to  
14 assert claims in the Rose Ranch case, to the extent that their  
15 claims are not satisfied from the insurance. And Rose Ranch  
16 reserves its right to object to any claim for any reason,  
17 including the fact that the bar date has passed.

18 Counsel to the creditors' committee has been provided  
19 with a copy of the stipulation prior to today's hearing. The  
20 debtors believe that the terms of the stipulation are  
21 reasonable. And if the Court has no questions we'd request  
22 that the Court so order the stipulation.

23 THE COURT: This has been pending for a long time and  
24 has been adjourned on numerous occasions. I have no interest  
25 in upsetting a settlement. One question, how does this impact

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1 the request for 2004 examinations?

2 MS. MARCUS: My understanding is that that request  
3 will be withdrawn, Your Honor.

4 THE COURT: I'd like that confirmed on the record.

5 MS. MARCUS: I'm not sure if counsel -- I don't think  
6 they're here. I don't know if they're on the phone but I  
7 can -- how would you like me to handle that?

8 THE COURT: I'm going to treat the fact that it's not  
9 covered in the stipulation as an indication that the motion is  
10 withdrawn without prejudice.

11 MS. MARCUS: That's fine, Your Honor.

12 THE COURT: All right. The stipulation will be  
13 approved.

14 MS. MARCUS: Thank you, Your Honor.

15 The next item, Your Honor, is the debtors' motion to  
16 establish procedures for the consensual amendment and  
17 assumption of certain nonterminated pre-petition derivatives  
18 contracts. The debtors filed the declaration of Daniel Ehrmann  
19 of Alvarez & Marsal in support of the motion.

20 Just a little bit of background, Your Honor. In light  
21 of the upcoming confirmation hearing, the debtors have been  
22 engaged in a massive review of all of their executory  
23 contracts, and in particular their huge portfolio of  
24 derivatives contracts. In making decisions regarding  
25 assumption or rejection of such contracts, the debtors realized

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1 that there was a group of derivatives contracts as to which the  
2 debtors might be able to pay a small sum in order to obtain  
3 substitute performance by a third party and thereby obtain the  
4 counter-parties' consent to assumption and assignment of in the  
5 money contracts.

6 Specifically, the motion seeks authority for the  
7 debtors to amend and assume any derivatives contract, determine  
8 the applicable cure amount under such contract, and satisfy all  
9 cure amounts and pay any fees associated with securing  
10 substitute performance without further order of the Court but  
11 subject to the approval of the creditors' committee and the  
12 applicable counter-party.

13 We received two responses to this motion, although my  
14 understanding is there's a third one that's not reflected on  
15 the agenda. The statement of Asbury Atlantic, Inc. and Asbury  
16 Solomons, Inc. and the reservation of rights of Bank of  
17 Montreal; I understand that U.S. Bank filed a similar  
18 reservation of rights. The responses are similar and can be  
19 dealt with by the clarification on the record.

20 Asbury Atlantic and Asbury Solomons state that they  
21 are filing their reservation in order to, quote, "make clear  
22 that nothing in any order granting the motion shall be  
23 construed as authority for the debtors to take any unilateral  
24 action to amend the Asbury swaps", close quote.

25 Bank of Montreal, and I suppose U.S. Bank, state that

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1 they filed their reservation of rights to preserve their  
2 position that the motion does not apply to their master  
3 agreement which it contends has been terminated, and to  
4 preserve its right to insist upon full compliance with the  
5 terms of the Bankruptcy Code.

6 As I indicated, Your Honor, we think our motion was  
7 very clear, but these are only consensual agreements and  
8 therefore we don't view either reservation of rights as, in  
9 effect, an objection to the motion. I'm happy to make the  
10 clarification again that we're only talking about consensual  
11 resolutions here.

12 THE COURT: That's how I read the motion.

13 MS. MARCUS: Thank you, Your Honor.

14 I would like to note that the motion does indicate  
15 that the debtors reserve all their rights should it become  
16 necessary at some point down the road to assume these contracts  
17 over the opposition of counter-parties, but that's not the  
18 subject of this motion at all. And with that, Your Honor, we'd  
19 request that the Court approve the motion.

20 THE COURT: I'm prepared to do that but I'm going to  
21 ask whether or not any of the parties that filed reservation of  
22 rights wish to be heard.

23 MR. PRICE: Good morning, Your Honor. Craig Price  
24 from Chapman and Cutler. I'm here on behalf of both the Bank  
25 of Montreal and U.S. Bank. We filed reservation of rights and

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1 we're fine with the clarification that this only applies to  
2 nonterminated agreements.

3 THE COURT: Okay. No one else seems to want to say  
4 anything. It's approved.

5 MS. MARCUS: Thank you, Your Honor.

6 Item 4 on the agenda is the debtors' motion pursuant  
7 to sections 105(a) and 363 of the Bankruptcy Code and Rule 9019  
8 for approval of a settlement and compromise with Danske Bank.  
9 The debtors have filed a declaration of Daniel Ehrmann in  
10 support of this motion as well.

11 The settlement resolves claims filed against LBHI and  
12 LCPI by Danske relating to a 1996 master repurchase agreement.  
13 Danske filed claims against LBHI and LCPI in the amount of not  
14 less than approximately 699 million which the motion defines as  
15 the deficiency claims. In addition, Danske filed additional  
16 claims against LBHI and LCPI in the amount of 40 million  
17 dollars.

18 The settlement provides that Danske will have a  
19 nonpriority general unsecured claim against each of LCPI and  
20 LBHI in the amount of 580 million dollars. Danske will also  
21 waive and release the additional claims with prejudice. Danske  
22 will also cause its wholly owned subsidiary to assign a loan  
23 that we've called the Playa Pelicano loan in the original  
24 amount of 33 million dollars to LCPI. And LBSF shall waive any  
25 claims it may have against Danske under certain documents.

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1 There are certain Danske excluded claims which are not being  
2 released under the terms of the settlement agreement. And LBHI  
3 and LCPI on the one hand and Danske on the other hand, release  
4 each other from all claims under the master repurchase  
5 agreement, the deficiency claims, the guarantees and related  
6 documents.

7 Contemporaneously with entering into the settlement  
8 agreement, Danske entered into a plan support agreement. As  
9 indicated on the agenda, no objections to the Danske settlement  
10 have been filed with the Court. For the reasons set forth in  
11 the motion and the Ehrmann declaration, the debtors believe  
12 that the Danske settlement is fair and equitable and in the  
13 best interests of the debtors' estate, and we request that the  
14 Court approve it.

15 THE COURT: I'm prepared to do that. It's  
16 uncontested. I would be comforted to hear that the creditors'  
17 committee has reviewed this and has no issue.

18 MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank,  
19 Tweed, Hadley & McCloy on behalf of the official committee of  
20 unsecured creditors.

21 Yes, Your Honor, the committee has, as was the case  
22 with the Lehman Re, the State Street, the Swedbank settlements,  
23 which were very similar and all part of the whole, you know,  
24 repo to the street program that Lehman had engaged in for a  
25 period of time. We have reviewed the amount of the deficiency

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1 claim, in particular. Our real estate financial advisors have  
2 independently looked at the competing expert reports that went  
3 into the mediation here and have compared the values ultimately  
4 agreed to to their own underwriting of these properties, and  
5 believe that in light of the litigation risks involved in going  
6 further with a litigation on these fronts that the numbers that  
7 we came out with here, 580 million, with all the other issues  
8 thrown in are a fair settlement for the debtors.

9 THE COURT: Fine. The settlement is approved.

10 MS. MARCUS: Thank you, Your Honor.

11 My partner Richard Krasnow will handle item number 5  
12 on the agenda.

13 May I be excused, Your Honor?

14 THE COURT: Okay.

15 MS. MARCUS: Thanks.

16 MR. KRASNOW: Will Your Honor bear with me for one  
17 minute? We may have resolved one of the objections. I just  
18 need to, if I may, consult?

19 THE COURT: You may consult.

20 (Pause)

21 MR. KRASNOW: Your Honor, Richard Krasnow, Weil  
22 Gotshal & Manges on behalf of the Chapter 11 debtors.

23 I appreciate the Court's indulgence. It will be  
24 rewarded, Your Honor; we have resolved one of the objections.

25 Your Honor, the next matter on the calendar in the

LEHMAN BROTHERS HOLDINGS INC., ET AL.

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1 Chapter 11 cases is the joint motion of LBHI and the SIPA  
2 trustee seeking approval or authority to consummate a stock  
3 purchase agreement relating to shares of Aceso, a wholly owned  
4 subsidiary of LBI, and for authority for the SIPA trustee and  
5 LBHI to compromise and settle disputes that they have or may  
6 have with respect to Aceso and a VEBA that is controlled by  
7 Aceso.

8 Your Honor, the item is item number 5 on the LBHI or  
9 the debtors' agenda and item number -- I'm sorry, Your Honor --  
10 number 6 on the SIPA agenda. I assume Your Honor will consider  
11 that together.

12 THE COURT: It's item 7 on the SIPA agenda.

13 MR. KRASNOW: I misspoke, Your Honor.

14 Your Honor, pursuant to this motion we are seeking  
15 very limited relief, which is to say, Your Honor, that if the  
16 Court were to be inclined to grant the relief sought in the  
17 motion then that relief would be limited to a transaction  
18 pursuant to which the SIPA trustee will sell and LBHI will buy  
19 the shares of Aceso which are owned by the trustee for a very  
20 limited purchase price of 1,885 dollars. And LBHI would agree  
21 to reduce a claim that it has asserted against LBI relating to  
22 funding that had been provided by LBHI to LBI on September 12,  
23 2008 of 125 million dollars of which 90 million dollars was  
24 used by LBI to fund a VEBA which is controlled by Aceso.

25 Additionally, LBHI and the SIPA trustee on behalf of

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1 LBI, pursuant to that agreement, would be exchanging neutral  
2 releases relating to claims which are property of their  
3 respective estates, no more but no less, but only claims that  
4 are property of their respective estates that pertain to the  
5 VEBA. That is the only relief that we and the SIPA trustee are  
6 seeking today.

7 Your Honor, there were three groups of objections that  
8 were filed to the motion, one of which was filed by the  
9 Department of Labor, which was the objection as to which I  
10 requested the Court's indulgence to engage in a discussion with  
11 the representative with the Department of Labor. We believe we  
12 have resolved that objection.

13 We have done it and will do it in two ways, the first  
14 of which we've already done. That first step was to revise the  
15 order, and the blackline copy of the revised order was attached  
16 to our response to the objections so that the order is even  
17 clearer that the only relief that the Court would be granting  
18 to us and the only approval that the Court would be granting to  
19 us, if the Court is inclined to grant the motion, would be to  
20 approve the sale, the transfer of the shares which I've  
21 described, and the compromising settlement which is part and  
22 embedded in the releases.

23 What the Department of Labor has asked that we do is  
24 to revise the order further to make it clearer, although we  
25 think it's clear anyway, but to make it clearer that the only

Page 20

1 claims that are being released here are claims which are  
2 property of the respective estates, that is to say, LBHI and  
3 LBI. Now while it's our view that we can only release claims  
4 that are property of our estate, in light of the fact that if  
5 we amend the order as I've so described, that apparently will  
6 satisfy the Department of Labor so we do not need to consider  
7 any further the objection it filed. We're prepared to do that  
8 and we believe that the SIPA trustee is similarly prepared to  
9 amend the order in that regard.

10 In light of -- well, Your Honor, perhaps the  
11 Department of Labor may want to speak so we can see if I am  
12 accurate in that regard, and then we can deal with the other  
13 objections that have been filed, if that's acceptable to the  
14 Court.

15 THE COURT: That is acceptable. I'd first like to  
16 confirm that the SIPA trustee agrees with what you have just  
17 said so at least the parties to the transaction are on the same  
18 page.

19 MR. KRASNOW: Yes, Your Honor.

20 MR. LEE: Good morning, Your Honor. Kenneth Lee from  
21 Levine Lee representing the SIPA trustee, James Giddens.

22 I would like to echo Mr. Krasnow's remarks. The SIPA  
23 trustee is in agreement with the proposed revisions to the  
24 order to further clarify it that have been requested by the  
25 Department of Labor, and we are in favor of granting the relief

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1 sought.

2 THE COURT: Okay.

3 MR. LEE: Thank you, Your Honor.

4 THE COURT: I'll hear now from counsel for the  
5 Department of Labor.

6 MR. GERSON: Good morning, Your Honor. Leonard Gerson  
7 for the U.S. Department of Labor.

8 We are in agreement with the proposed revisions that  
9 Mr. Krasnow described to the Court. We appreciate the effort  
10 that's been made to clarify the order.

11 THE COURT: If you could just explain to me what your  
12 concern was and how that concern has been resolved by virtue of  
13 the language change.

14 MR. GERSON: Under ERISA, unlike bankruptcy, there's  
15 this concept of two hats. You wear a hat with respect to  
16 whatever allocations you have to your employer, the  
17 corporation. You also have separate obligations to an ERISA  
18 plan if you're a fiduciary to an ERISA plan. Part of those  
19 obligations can be bringing an action if there is a violation  
20 of ERISA. That action would not be property of the estate  
21 because it wouldn't be for the benefit of the estate,  
22 nevertheless you have an obligation to bring that action. So  
23 we wanted it to be clear that what was not being released was  
24 any obligation that LBHI or LBHI employees or officers had to  
25 bring an ERISA action if there was a violation --

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1 THE COURT: Understood.

2 MR. GERSON: -- with respect to the plans.

3 THE COURT: Thank you for the clarification.

4 MR. GERSON: You're welcome.

5 THE COURT: And I take it you're satisfied that the  
6 language being added to the order --

7 MR. GERSON: Right.

8 THE COURT: -- will resolve this to at least the  
9 Department's satisfaction.10 MR. GERSON: That's correct, Your Honor. Of course it  
11 wasn't just this language that was added this morning, it was  
12 the earlier language that the debtors and the SIPA trustee  
13 added to make it clear that all the Court was approving was the  
14 transfer of the stock and the limited release in the stock  
15 purchase agreement rather than any future actions that will be  
16 taken by the debtors once they own the stock, and furthermore,  
17 their statement in their papers that any further actions they  
18 take will be in compliance with ERISA.

19 THE COURT: All right.

20 MR. GERSON: Thank you, Your Honor.

21 MR. KRASNOW: Your Honor, now just to turn to the two  
22 categories with remaining objections before I get into some of  
23 the details of the motion which, if you will, deal with some of  
24 the issues raised in the objection.

25 In addition to the formal objection that was filed by

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1 the Department of Labor which has been just been resolved,  
2 there was something which I will style as a formal objection  
3 filed by a Ms. Wendy Uvino. As reflected in that document, Ms.  
4 Uvino has no economic stake whatsoever with respect to this  
5 motion.

6 THE COURT: But she was, at least at one time  
7 according to the objection, trustee of the VEBA.

8 MR. KRASNOW: She was at one time, but currently --

9 THE COURT: That's what I said.

10 MR. KRASNOW: -- and currently is not a trustee of the  
11 VEBA. She also was, as the Court may be aware in light of the  
12 pending litigation with Ms. Uvino, an officer of LBHI involved  
13 with HR. And indeed she, in that capacity, assisted the  
14 debtors and their professionals in the due diligence and  
15 analysis of the group benefit plan, particularly with respect  
16 to retirees in connection with the ultimate termination of the  
17 plan as it relates to the retirees that occurred over two years  
18 ago.

19 THE COURT: If I could just interject, and I don't  
20 want to in any way deflect you from your chosen rounds of going  
21 through the various objections, but I have reviewed each of the  
22 objections, including the objections that were not formally  
23 docketed, submitted in written form by a member of former  
24 Lehman employees, some of whom are, by their own description,  
25 elderly and infirm, who have expressed deep-seated concerns

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1 about this motion, whether or not there has been sufficient  
2 time to respond to the motion and the potential impact that the  
3 motion may have upon ongoing health care and retiree benefits  
4 to which these individuals may be entitled.

5 If I understand correctly what you have represented at  
6 the outset as to the limited nature of the relief being sought,  
7 and if I understand what the Department of Labor's counsel has  
8 said in reference to the limited nature of the releases being  
9 exchanged, at least in respect of possible claims arising under  
10 ERISA, is there anything for the Court to deal with in  
11 reference to the pending objections? Because it's my strong  
12 sense, but I want to discuss it with you, that the relief being  
13 sought is so limited that read literally it does not have any  
14 direct or indirect impact upon the rights of any individual  
15 beneficiary of the VEBA, although it is conceivable that if  
16 future acts as suggested in the motion take place, there could  
17 be an adverse impact. But I'm not approving that now. Do I  
18 understand that all correctly?

19 MR. KRASNOW: Your Honor took my presentation out of  
20 my mind and into your own statements. Absolutely. That was  
21 precisely the point that we attempted to make in our response  
22 and I intended to address here today.

23 The concerns that have been expressed by the retirees,  
24 concerns that we're very sympathetic about, one could say that  
25 it's one thing for a creditor in a commercial transaction to

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1 lose money as a consequence of a bankruptcy, but that's not the  
2 same as retirees, as a consequence of the failure of a business  
3 losing or potentially losing medical benefits. So we're very  
4 sympathetic to that. And there is nothing that the Court would  
5 be doing today that directly affects that.

6 In the motion, out of a desire to be as transparent as  
7 possible, not only from the perspective of advising the Court  
8 and the creditors, but more importantly the retirees, we felt  
9 that the right thing to do is to advise the retirees as to the  
10 source of payments to them with respect to medical benefits  
11 which are not now covered by a debtors' sponsored group plan,  
12 and what action we may or may not be taking in the future, in  
13 part based upon what the Department of Labor may or may not do  
14 with respect to an application that we have not yet filed with  
15 respect to the use of certain of the VEBA funds, which funds  
16 will only be used consistent with the terms of the VEBA, and  
17 whatever exemption we may get from the VEBA to reimburse the  
18 estate for certain monies that they expended with respect to  
19 benefits. But as far as the relief that we are seeking today  
20 from the Court, were the Court to grant it, it doesn't deal at  
21 all with respect to potential future events.

22 THE COURT: Let me just ask this question because I  
23 don't want to predict what may be in the minds of the  
24 individual objectors who are concerned about the consequences  
25 of future acts. But how will these individuals ever know

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1 what's going on with respect to the VEBA and will they have an  
2 opportunity to be heard, to the extent that they have an  
3 objection?

4 MR. KRASNOW: Well, Your Honor, I'll try to answer  
5 that as best I can because I'm not sure what the future events  
6 will be. To be clear, Your Honor, the VEBA was formed prior to  
7 the commencement of the case, prior to any knowledge that there  
8 would be a case, but with full knowledge that things were  
9 somewhat in distress at Lehman. There was a concern --

10 THE COURT: So this was a lifeboat created for -- this  
11 was a lifeboat --

12 MR. KRASNOW: Absolutely.

13 THE COURT: -- created for the benefit of certain  
14 present and former employees to protect employee benefits at a  
15 time of financial uncertainty?

16 MR. KRASNOW: If I can -- the answer to that is yes,  
17 but if I can rephrase that slightly because it becomes --

18 THE COURT: You don't like the term lifeboat?

19 MR. KRASNOW: Lifeboat I will accept because that's  
20 accurate. It was to try to ensure that those who were then  
21 covered by the LBHI group benefit plan were assured that no  
22 matter what happened there would be sufficient monies available  
23 to cover what was then estimated to be six months worth of  
24 medical benefits. And those individuals who were covered by  
25 that plan, generally speaking -- the plan itself, the terms of

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1 the plan govern so in case I misstate I'm not intending to  
2 expand the universe or decrease it -- were active employees of  
3 U.S. Lehman equities, some of which, but relatively few of  
4 which were employed by LBHI, most were employed by LBI and  
5 maybe subsidiaries -- then subsidiaries of LBI, employees who  
6 were on long-term disability and retirees.

7 At that time all medical expenses were self insured by  
8 Lehman. There was no insurance plan per se. So in furtherance  
9 of that, as I noted earlier, LBHI advanced, provided funding to  
10 LBI of 125 million, of which 90 million went into this health  
11 benefit trust which is the VEBA we've referred to.

12 We all know what events occurred on September 15th and  
13 September 19th of 2008 with respect to LBHI and LBI and  
14 thereafter for other Lehman entities. Notwithstanding those  
15 filings, health benefits were covered and were paid by the  
16 VEBA. No monies were expended by LBHI for anybody in that  
17 regard because the VEBA, consistent with its terms, covered  
18 those expenses. Asiko (sic) or Aceso -- I constantly  
19 mispronounce that -- Aceso was under the control --

20 THE COURT: Does that term have any meaning,  
21 incidentally?

22 MR. KRASNOW: If it does, Your Honor --

23 THE COURT: You don't know it.

24 MR. KRASNOW: -- I am completely unaware of what it  
25 is.

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1 THE COURT: All right. So it's just a made-up word?

2 MR. KRASNOW: Maybe. I don't know whether it was  
3 intended to stand for something.

4 But that was a wholly owned and continues today to be  
5 a wholly owned subsidiary of LBI, and therefore under the  
6 control of the SIPA trustee.

7 Between September and March the payments were made  
8 from the VEBA as was contemplated and provided for under VEBA,  
9 but in March of '09 the SIPA trustee caused the VEBA to suspend  
10 all payments. As a consequence, LBHI had to immediately step  
11 in and start covering, if you will, medical expenses for its  
12 active employees, and since the group benefit plan covered as  
13 well retirees, the retirees as well.

14 However, given the nature of the Lehman case, we are  
15 disposing of assets. It was clear to the debtors that at least  
16 as to retirees they could not, consistent with their fiduciary  
17 duties to their stakeholders, continue to make those payments  
18 ad infinitum. And so in or about June or thereabouts, after  
19 some thinking and analysis it was concluded that as it relates  
20 to the retirees LBHI would have to take appropriate steps to  
21 terminate those health benefits.

22 The question was what steps were to be taken, the  
23 timing of the implementation, and what, if anything, could be  
24 afforded to the retirees to cushion what could be a devastating  
25 blow. This was not going to be an action similar to that which

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1 LTV in its first Chapter 11 did, which was to just terminate  
2 the medical benefits and to see the kind of stories that  
3 appeared when that happened some decades ago, in terms of the  
4 impact on employees.

5 And so we dual tracked. The first was, while it had  
6 no obligation to do so, to explore whether or not we could  
7 provide to these retirees, at their own expense, some  
8 alternative. So when we announced to them we intended to  
9 terminate, we could similarly announce to them something that  
10 would be available to them for medical benefits, to pay medical  
11 benefits that would be a cheaper alternative than either having  
12 to look to themselves or to have to themselves purchase medical  
13 insurance.

14 At the same time, an analysis was undertaken, in light  
15 of the provisions of the group benefit plan, that allowed for,  
16 by their terms, a termination of all or any portion of the plan  
17 to any of the beneficiaries, as to whether or not there were  
18 any parties who had vested benefits, because it was our view,  
19 based on the case law in this district, that in light of the  
20 terms of those benefit plans we could terminate them without  
21 having to go through the 1114 process, as to those individuals  
22 who did not have vested benefits. If somebody had vested  
23 benefits we could not terminate those benefits outside of 1114.  
24 And so while we were looking for alternatives, we undertook as  
25 extensive a due diligence process as we thought we could, which

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1 was overseen by Ms. Uvino. And at the conclusion of that due  
2 diligence process, we determined that it did not appear that  
3 there were any documents that afforded to anybody any vested  
4 rights for medical benefits.

5 Concurrently with that, based on discussions that we  
6 had with Aetna, we were able to afford to employee -- retirees  
7 a non-LBHI-sponsored plan -- a plan which, at least  
8 colloquially speaking, was an Aetna plan -- which employee --  
9 the retirees could avail themselves of, cheaper premiums than  
10 they would otherwise have and some sort of bridge, if you will.

11 We determined that this was not something which we  
12 would give thirty days' notice to or sixty days' notice to  
13 employees -- or retirees. And so, in October, we sent notices  
14 out advising these retirees that we would be terminating the  
15 plan as to them, effective December 31, and gave them notice of  
16 this Aetna plan, if you will.

17 Notices were given to approximately 1,100 retirees.  
18 There were numerous inquiries, as one would expect, in response  
19 to that. I can't characterize all of them, but my  
20 understanding is many of them had indicated an expectation that  
21 it was going to happen, in light of where Lehman was, and an  
22 appreciation for the fact that we actually expended time and  
23 effort to see whether we could at least facilitate offering to  
24 them this Aetna plan. In none of the communications that we  
25 received from these parties at that time did anyone indicate

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1 that they had any vested benefits. The group benefit plan was  
2 terminated as of December 31.

3 As I previously indicated, Your Honor, the group  
4 benefit plan -- or the VEBA, rather, by its terms, was to be  
5 used for the benefit of beneficiaries of the plan. Therefore,  
6 effective December 31 -- or January 1, I may be off by a day --  
7 that VEBA could not, by its terms, be used for anyone other  
8 than active employees and those with long-term disabilities who  
9 were going to be going on to a COBRA because they, too, got  
10 notices, but they had COBRA available to them -- couldn't be  
11 used for them either, excuse me. I don't think it could be  
12 used for COBRA.

13 In January of 2010, the SIPA trustee decided to cause  
14 the VEBA to be amended so that it would include the retirees.  
15 And he had the ability to cause that to happen because Aceso  
16 was under his jurisdiction.

17 I should note, Your Honor, that, as reflected in the  
18 motion, we have made a commitment to the trustee because he  
19 made it a condition of this deal that the VEBA would continue  
20 to be used for those purposes -- that is, to cover the  
21 retirees -- so long as there are funds there. We have  
22 indicated that we will not only do that, but continue to use  
23 the VEBA for the remaining purposes for which it exists, which  
24 is to cover active employees. And we would cover COBRA  
25 payments with respect to those with long-term disabilities. It

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1 is our intention to use the VEBA for those purposes, as we set  
2 forth in the motion.

3 There is something else we are going to try to do, and  
4 we made it clear in the motion papers. As a result of the  
5 trustee's suspension of the VEBA in March of 2009, as I  
6 indicated, we had to take on all of those expenses. And while  
7 the VEBA was amended in January 2010 to cover the retirees as  
8 well as others, the SIPA trustee only allowed the VEBA funds to  
9 be used for the retirees. He did not allow it to be used to  
10 cover the LBHI active employees, even though they were clearly  
11 within the then group benefit plan and today's group benefit  
12 plan.

13 LBHI was required, therefore, to expend monies that  
14 should have been covered by the VEBA and would have been  
15 covered by the VEBA, but for the actions taken by the SIPA  
16 trustee. We believe it is appropriate to seek reimbursement --  
17 not a reversion, but reimbursement -- of that which LBHI  
18 expended and that should have been covered by the VEBA.

19 While I understand there may be a debate as to whether  
20 or not we need an exemption from the Department of Labor in  
21 order to be able to do that, we are -- it is our intention to  
22 seek such an exemption. That's not something before the Court.  
23 If we obtain that exemption, then there will be the  
24 reimbursement of approximately twenty-five million dollars. If  
25 the exemption is not obtained, then we will not have the

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1 reimbursement and we will have to evaluate what the then uses  
2 of those monies will be, consistent with the terms of the VEBA  
3 and applicable law, including ERISA.

4 Now, all of that ultimately has an effect on the  
5 retirees, but lest we forget, this is a limited fund in any set  
6 of circumstances. It will end. When it will end, vis-a-vis  
7 the retirees, I cannot stand here and tell you. We believe  
8 that no matter what happens, it will continue at least through  
9 2012. Whether it continues much beyond that I can't really  
10 say. But while we understand why the retirees would prefer  
11 that the VEBA be used only for their benefit, the fact of the  
12 matter is that the VEBA was created for the benefit of others  
13 as well. And we intend to, as we should, use it for those  
14 purposes as well.

15 THE COURT: Well, my understanding, which has been  
16 clarified now on multiple occasions during this morning's  
17 hearing, is that today's motion does not directly or even  
18 indirectly implicate what happens in the future with respect to  
19 the reimbursement claim.

20 MR. KRASNOW: Correct, Your Honor.

21 THE COURT: And so there's nothing in today's motion  
22 that directly or indirectly impacts the rights of those who  
23 have objected in their capacity of beneficiaries of the VEBA.

24 However, by virtue of the fact that the motion  
25 provides reasonable transparency into the debtors' thought

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1 process with respect to a claimed entitlement to reimbursement  
2 of up to twenty-five million dollars and inasmuch as effecting  
3 such reimbursement reduces the funds within the VEBA available  
4 to pay ongoing benefits to retirees and others, I understand  
5 the reason that so many parties have chosen to be heard by  
6 submitting letters to me and filing those letters on the  
7 docket.

8 Which brings me back to the question I asked you about  
9 fifteen minutes ago --

10 MR. KRASNOW: Sorry, Your Honor.

11 THE COURT: I appreciate the long explanation; it's  
12 very helpful. But the question is in what manner, if at all,  
13 will these individuals and others similarly situated know about  
14 what's going on with respect to the VEBA?

15 MR. KRASNOW: We will have to -- I can't speak to what  
16 is required under ERISA, but if we determine that, within a  
17 reasonable period of time, the VEBA funds will not be available  
18 because they will have been depleted, we will give notice to  
19 the retirees because, presumably, the Aetna plan will still be  
20 there. And in order for them to avail themselves of that, they  
21 will have to start making the premium payments.

22 It would not seem, to me, appropriate to give someone  
23 notice of that of thirty days. So we will give them reasonable  
24 notice based upon whatever the circumstances may be at the  
25 time, including an analysis of where we -- are we on the

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1 twenty-five million and what we envision the future uses will  
2 be. I cannot speak, Your Honor, to what rights, if any, the  
3 retirees will have, once we give them the notice, under  
4 applicable law. But whatever rights they may have, whatever  
5 notices LBHI is required to give, it will give.

6 As I noted earlier, Your Honor, it's not clear we had  
7 to give ninety days' notice when we decided to terminate the  
8 plan as it related to them, but we thought it was the right  
9 thing to do. I would like to think, Your Honor, that that  
10 approach will continue even after our emergence from Chapter  
11.

12 I hope I've been responsive to Your Honor.

13 THE COURT: You have been responsive, although I  
14 suspect anybody who's listening to this won't really understand  
15 what, if any, notice they're going to be able to get. And I  
16 think that's probably because you don't know.

17 MR. KRASNOW: You're absolutely right, Your Honor.

18 THE COURT: Okay.

19 MR. KRASNOW: I've tried to explain it as best I can.

20 THE COURT: Now, I do have a fundamental question that  
21 I just don't know the answer to on the basis of looking at the  
22 papers, which is whether or not the change in equity control of  
23 Aceso, A-C-E-S-O, will lead to any change in ongoing management  
24 of the VEBA in terms of the identity of the trustee, the  
25 decision process with respect to the VEBA and the management of

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1 its assets.

2 MR. KRASNOW: I think the answer is we don't believe  
3 there will be any. In fact, I don't want to speak for the SIPA  
4 trustee, but I think one of the motivations that the SIPA  
5 trustee had in agreeing to this transaction was that we were in  
6 a better position to manage the VEBA than, frankly, the SIPA  
7 trustee is. They have a different focus than we have had.

8 I don't believe that today there is a view that there  
9 will be a change in who is the trustee --

10 THE COURT: Who is the trustee now?

11 MR. KRASNOW: Carol Rado, I think is the trustee, who  
12 is an employee of either LBHI or LAMCO.

13 UNIDENTIFIED SPEAKER: LBHI.

14 MR. KRASNOW: Of LBHI, Your Honor.

15 So there has been an LBHI employee who has been a  
16 trustee of the VEBA since the commencement of the Chapter 11  
17 case. So that's -- there -- to that extent, LBHI, if you will,  
18 has been involved -- certainly has been aware. So we do not  
19 envision, as of today, any change.

20 THE COURT: Okay. Is there anything more you wish to  
21 add at this point?

22 MR. KRASNOW: Your Honor, for the reasons set forth in  
23 the motion and on the record, and I also would refer to the  
24 declaration of Mr. Hershan, which was filed with the motion, we  
25 believe that the proposed transaction is in the best interest

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1 of LBHI, its creditors, and should be approved.

2 THE COURT: Before asking if any of the objectors who  
3 are on the phone or present in court wish to be heard, I'm  
4 going to ask counsel for the SIPA trustee to explain, from his  
5 perspective, why this transaction makes sense.

6 MR. LEE: Your Honor, Ken Lee, for the SIPA trustee.

7 The transaction makes sense from the perspective of  
8 the SIPA trustee, Your Honor, because it was our conclusion,  
9 after doing extensive fact investigation as to the purposes  
10 behind the creation of the VEBA and the purposes for which it  
11 was intended that the funds had a very limited purpose and  
12 could not be really directed to the benefit for any claimants  
13 in the SIPA proceeding -- any customer claims or other non-  
14 customer claims -- and that, in addition to that, it was  
15 requiring the trustee to expend some amount of time and  
16 attention on managing an entity over which it didn't actually  
17 have full control since the -- as explained, the VEBA has its  
18 own trustee. And LBHI is involved with respect to various  
19 benefit plans and administering benefits to current and former  
20 employees.

21 In addition to that, there were a number of disputes  
22 between LBI and LBHI concerning the funding of the VEBA and as  
23 to whether there were claims going in both directions for those  
24 sums of money. And this proposed transaction resolves all of  
25 those claims and, therefore, settles a significant matter that

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1 is open between LBI and LBHI.

2 So for those reasons, we believe that it is in the  
3 best interest of the LBI estate as well.

4 THE COURT: Okay.

5 MR. LEE: Thank you, Your Honor.

6 THE COURT: You wish to be heard on behalf of the  
7 committee?

8 MR. O'DONNELL: Dennis O'Donnell, Milbank, Tweed,  
9 Hadley & McCloy, on behalf of the official committee.

10 Just to note that we have had extensive discussions  
11 with the debtors about this motion as well and believe that in  
12 its narrow form, the form presented to the Court today, in  
13 terms of the two components, it should be granted. Obviously,  
14 based on Mr. Krasnow's presentation, there are lots of issues  
15 that will need to be dealt with after this transaction is  
16 consummated. And we're simply reserving our rights with  
17 respect to how all those should turn out.

18 THE COURT: All right. I'll now hear from anybody who  
19 is in court, either as an individual or through counsel or by  
20 telephone, who have lodged objections to the requested relief.  
21 You can come forward if you wish.

22 Please identify yourself for the record.

23 MR. DELANEY: Yes, sir. Judge, first of all, thank  
24 you very much for letting me come here. My name is Steve  
25 Delaney. I am a retiree from Lehman Brothers. I worked there

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1 for about twenty-four years and retired in 2006.

2 I raise this just because I heard about standing. I  
3 thought it'd be good if I could just explain what the program  
4 was that I was involved with. I don't know anything about the  
5 disabled programs, the COBRA programs or what have you. But  
6 when I went to work at Lehman Brothers, part of the procedure  
7 and part of the policy indicated that if you stayed at Lehman  
8 Brothers -- and this is back in 1983 -- and retired from Lehman  
9 Brothers at fifty-five, you would have lifetime retiree health  
10 benefits.

11 You had to do some things. First of all, you had to  
12 be an employee, I think, before 1990. So the universe is  
13 fairly small with regard to that. Second thing is you had to  
14 retire at age fifty-five, so you had to have longevity. And  
15 the accumulation of your age and time in service had to be  
16 seventy-five pts. In --

17 THE COURT: Can I ask you, was fifty-five viewed as  
18 regular retirement or early retirement?

19 MR. DELANEY: I don't know the answer to that, Judge.  
20 I know at fifty-five, you qualify for all the retirement  
21 benefits. There was no mandatory retirement --

22 THE COURT: This is what bankrupted Greece, you know.

23 MR. DELANEY: It probably may have bankrupted -- I  
24 don't think this bankrupted Lehman Brothers. I'm pretty sure  
25 of that.

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1 THE COURT: All right.

2 MR. DELANEY: So as far as standing, that's where I  
3 am. I am a retiree. I've been receiving the benefits.

4 I heard today from counsel that this program was  
5 terminated at one point in time, somewhere in 2009. It may  
6 have been terminated in the back rooms with other people  
7 discussing, but the reality of it is, for the retirees, when  
8 they would notify of a termination of this program, what do  
9 they all do? They all call human resources. I called human  
10 resources. This is important benefit, what is going on? The  
11 response was not that you're not going to have health coverage.  
12 The response is very simply do not worry, it's going to be  
13 taken care of, you're going to continue to have your health  
14 coverage and it's still going to be the same program,  
15 administered by Aetna, and you'll still pay the same  
16 coverage -- I have the same -- paying the same premium.

17 THE COURT: Who made the --

18 MR. DELANEY: So the reality of it was --

19 THE COURT: Excuse me, just -- who made these  
20 representations to you?

21 MR. DELANEY: Human resources at Lehman Brothers HI.  
22 And it wasn't so much the representations. It was because  
23 after they announced to us that we were going to get this  
24 coverage and it was going to be through LBHI, we proceeded to  
25 get our quarterly bill from Aetna which was the same insurance

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1 coverage for the exact same amount and we had the same  
2 coverage.

3 And I've been having that coverage for the last two-  
4 and-a-half years. And I think it's absolutely great. I get a  
5 bill every quarter from Aetna under the term Lehman Brothers  
6 Holdings, Inc. Special program -- special statement for my  
7 health insurance.

8 So as far as what I knew and what other retirees -- I  
9 can't speak for them -- knew, there was no termination. We  
10 continue to have the same coverage for the same amount for the  
11 period of time that we're into bankruptcy.

12 Now, I really didn't understand -- I hate to  
13 apologize -- the machinations that went on before in terms of  
14 what was really being asked for. When I read the document, I  
15 literally viewed this as two things: one, the holding company  
16 wants to end retiree health benefits and, two, they got a pot  
17 of gold of thirty-seven million dollars and they want to take  
18 twenty-five million and turn that over to LBHI to pay for the  
19 employee health benefits while they continue to work at Lehman  
20 Brothers after the bankruptcy.

21

22 Now I can understand looking at this that the money was put  
23 aside for the benefit of retirees and other people. At some  
24 point in time, there becomes an important decision as who are  
25 we working for.

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1           In my letter, I indicated that as of the filing of  
2           bankruptcy, the Lehman creditors, really, were the only party  
3           in interest as far as what was left of the estate. If Lehman  
4           Brothers at that point in time had been dissolved or liquidated  
5           within six months, the creditors would have gotten X cents on  
6           the dollar. I think at the CDS auction -- I don't know -- who  
7           knows -- the price was somewhere around eight and a half, nine  
8           cents on the dollar. A decision was made at the holding  
9           company to keep this in operation. Why? For the benefit of  
10           the creditors. And it was a very good benefit, because if we  
11           look at the benefits to the creditors, the value of their bonds  
12           which were in CDS at eight or nine cents on the dollar, are now  
13           trading -- at least on the bid side, at twenty-four, which  
14           means they're probably worth a lot more.

15           So by keeping this entity alive for two and a half  
16           years, what I understand from press releases, there's 160 of  
17           billion of debt out there, at 18 points, keeping Lehman alive  
18           has resulted in a benefit to the creditors of about 22 billion  
19           dollars. Having received that benefit, which can be totally  
20           liquidated right now in the market, but I think they'll all  
21           hang on for the recovery, now we have LBHI coming back to a pot  
22           and saying we want twenty-five million out of that to pay for  
23           the health benefits for individuals who were employed to  
24           increase the value of the holdings of the creditors. Which  
25           they did. And it's great. And I don't begrudge, you know, the

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1 creditors getting their piece of the action out of this. But  
2 we have a trust that may have come to an end in terms of health  
3 benefits for LBHI in seven months; they're now trying to milk  
4 this for another two and a half years while they reap the  
5 benefit of this.

6 As I look through the Bankruptcy Rule -- because I've  
7 got to admit I only used Google for this, so probably not the  
8 most extensive coverage, there are two things that I saw about  
9 benefits; one, has anyone been appointed to represent us? I  
10 don't know. The only thing I got was that notice in the mail  
11 to which I filed an objection. It talks in terms of what's  
12 fair and equitable for all parties; the debtor, the creditor,  
13 retirees, whatever they may be. The -- I understand that what  
14 you did today certainly didn't impact us directly. But I  
15 think --

16 THE COURT: I haven't done anything yet.

17 MR. DELANEY: oh, I'm sorry, Judge. But --

18 THE COURT: I'm just --

19 MR. DELANEY: -- it sounded like --

20 THE COURT: I'm just listening.

21 MR. DELANEY: Okay. But it seems to me, looking at  
22 what has gone on over this period of time -- it's been three  
23 and a half years. I honestly do not know what benefits I have  
24 under any statute, bankruptcy or risk or anything like that.  
25 We've got a million lawyers here and not one of them can tell

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1 me just what my benefits are?

2 I don't want to rabble rouse, but I'd like to know  
3 where we stand and I'd like to know why can't we have someone  
4 appointed to represent us? We're spending a lot of money in  
5 this case for lawyers sitting around and doing things that may  
6 be beneficial or not beneficial. We have a statute that seems  
7 to convey some sort of interest to the retirees in this case,  
8 and if it's recognized, why can't we have someone speak on our  
9 behalf who is knowledgeable? I certainly am not knowledgeable  
10 in this area.

11 And the other things -- I'm requesting is one, I'd  
12 like to have someone appointed to make sure that we are fully  
13 versed in what our rights are. Second of all, I think the  
14 twenty-five million payments which may not be on the floor  
15 today but was certainly raised by those -- the motion should be  
16 denied. I don't know whether I'm going to around to get  
17 notice. As time goes on, the universe of these retirees gets  
18 smaller and smaller. As I say, you had to be you had to be  
19 retired at fifty-five and be employed at Lehman before 1990.  
20 So it's a smaller and smaller group and they're not around --  
21 it would seem to that to protect these people to the extent  
22 they are entitled to protection under the statute, that someone  
23 should be appointed to oversee what's going on. And I  
24 definitely think it's not fair in assessing the value to all  
25 parties that LBHI reap the gain of another twenty-five million

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1 while the retirees are losing health benefits.

2 THE COURT: Okay --

3 MR. DELANEY: Okay?

4 THE COURT: Thanks for your --

5 MR. DELANEY: Thank you very much.

6 THE COURT: -- presentation, Mr. Delaney.

7 Is there anyone else who wishes to be heard?

8 You may come forward.

9 MS. RASMUSSEN: Thank you, Your Honor. My name is  
10 Marianne Rasmussen. I'm a beneficiary of the trust but also I  
11 had been chief human resources officer at Lehman from 1994 to  
12 2001 and I had twenty-nine years of experience with the firm  
13 and then prior to that, Shearson Lehman and American Express,  
14 so it was all bridged.

15 A few things that were said today -- just doing math,  
16 when we talk about if the VEBA comes down to only twelve  
17 million, my calculation is that that would probably be only,  
18 like, maximum five months left. The reason I say that is  
19 because if we do the math, we've gone through almost fifty  
20 million dollars of the fund so far. So if we take away that --  
21 I'm sorry; maybe it's -- 150 -- but the 12 million dollars left  
22 would probably be substantially taken by year end because many,  
23 many people hold all their bills and they send them and submit  
24 them all at once. So that's one part of it, so it's usually a  
25 significant portion that eats up all that money at that point.

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1 And even if we have twelve million, it's probably four to five  
2 months left.

3 Also, there are a couple of things that were raised in  
4 counsels' response that I'd like to address. They talked  
5 about -- only about a dozen people responding. I talked to a  
6 number of people that I know. Three of the six people said  
7 they didn't even receive that one letter and the other three  
8 people that I spoke to -- well, I submitted an objection letter  
9 and so did Antoinette LaBelle. Other people just feel like  
10 they don't have the expertise and the ability to do it, so we  
11 do it as laypeople. But, also, Wendy Uvino's letter that was  
12 sent to the Court, even though it said an objection letter, I  
13 think it was more like an amicus friend of the Court letter  
14 that she was trying to do because she certainly had lots of  
15 experience. Some of the things that counsel said that she had  
16 to do -- well, she was employed by the firm so of course she  
17 had to go through this extensive research.

18 They also said there was only some response to the  
19 October 16th, 2009 letter that was Exhibit B. I happen to know  
20 that I personally tried to call and I was asked to call back  
21 several times because they had so many phone calls about that.

22 Then, it was also said that people didn't really call  
23 too much after -- between that two-year period of time. Well,  
24 I guess the question is why would they if they received a  
25 January 11th, 2010 letter which said, in bold, "No increase in

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1 your cost, new plan design applies, assuming arrangements for  
2 the health care trust to pay premiums are finalized. Your plan  
3 costs for 2010 will not increase over 2009 cost and therefore  
4 you will not be responsible for the full cost of coverage." So  
5 it's literally telling us it's going back to the way it was  
6 three months prior to when we received that October 2009  
7 letter.

8 So people -- of course they didn't respond because  
9 they thought everything had been taken care of. Again, most of  
10 the people that we're talking about are not sophisticated  
11 people. Forgetting about the percentage of people that are  
12 investment bankers and the traders. Seventy percent of the  
13 people were paid an average amount for their job. They were  
14 operations people, they were technology people, they were  
15 secretaries, et cetera. So when they receive a letter like  
16 this, they are confused and they probably don't know what to  
17 do.

18 Many of the trust beneficiaries are the old Shearson  
19 people. When I say old, I mean they're equivalent to almost  
20 our parents' age. I believe that many of them did have defined  
21 vested rights because many of them had the old Shearson wording  
22 and they have nothing else. And those did not -- those summary  
23 plan descriptions did not say anything about the company had  
24 the right to mend (sic), change or terminate. That was prior  
25 to 1994, prior to the IPO and many of these people have been

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1 retired for many, many years. These -- some of these people  
2 that are being affected are eighty-five, ninety year old  
3 people. And, as I said before, these people also -- not only  
4 are they aged people, but they also probably also lack the  
5 resources -- both the ability and the finance to really address  
6 some of these issues.

7 And with that, I thank the Court very much for your  
8 time.

9 THE COURT: Thank you, Ms. Rasmussen.

10 Is there anyone else in court who wishes to be heard  
11 on this issue?

12 Mr. Gerson?

20 THE COURT: Well, I hear what you said and before  
21 commenting further, I'd like to ask if there are any other  
22 affected retirees or objectors who wish to be heard who may be  
23 on the telephone, rather than present in court?

24 MR. GERSON: Of course, Your Honor. Thank you.

25 THE COURT: Okay. I hear --

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1 MS. ROTH: If it please Your Honor --

2 THE COURT: Please identify yourself.

3 MS. ROTH: Yes, good morning, Your Honor. My name is  
4 Barbara Roth (ph.), I.D. 45606260 --

5 THE COURT: You're going to have to speak up because  
6 you're coming through in a somewhat soft way.

7 MS. ROTH: I'm sorry, Your Honor. Good morning, Your  
8 Honor, Judge James Peck. My name is Barbara Roth, ID number  
9 4600260. I'm calling from Clearwater, Florida and wanted to  
10 thank you for the opportunity to present my case to you today  
11 regarding the notice of motion and settlement agreement  
12 regarding Lehman health care trust.

13 I submitted (sic) documentation from you with regard  
14 to the motion which was received via mail on October 25th at 6  
15 p.m. in route to the emergency room and I was admitted to the  
16 hospital from 10/25 and released this past weekend which did  
17 not give me the opportunity to present myself in New York. I  
18 believe that this motion was not given enough allocation (sic)  
19 for me get a legal representation. While I was in the hospital  
20 I had the benefit of contacting your office, Mary Lopez, the  
21 case administrator, and Epiq and also the debtors (sic) for  
22 Lehman Brothers Holding, Inc. with regard to how I need to file  
23 the motion.

24 According to Ms. Lopez, the lawyers filed -- excuse  
25 me, Your Honor, Weil, Gotshal & Manges, a former firm that I

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1 worked with, with Lehman, left out documentation with regard to  
2 how to file, where to file and the case number was missing  
3 because there were sub cases with each motion. Furthermore,  
4 per this letter, I contacted Lehman's hotline and left a voice  
5 mail message to find out how I can utilize forwarding this  
6 motion to you and I did not receive a response that was  
7 favorable until I was specifically told we are -- represent  
8 you, we're not at liberty to disseminate any information. And  
9 I explained to her my scenario of being in the hospital was --  
10 that I told to you --

11 THE COURT: Excuse me for breaking in. But I wonder  
12 if you could, rather than going through the background, tell me  
13 what your objection is. Just tell me what it is in plain  
14 language.

15 MS. ROTH: Well, my objection to you is I did not  
16 leave the do -- receive the documentation (sic) in time to hire a  
17 lawyer. I also thought that I was best in the company. I  
18 worked with Lehman Brothers from 1993 to 1995. I'm on  
19 disability and I've never seen any information with regard to  
20 the plan being terminated. I had various conversations with  
21 Carol Rayo (ph.) when they notified me that it was going to be  
22 seized and then I received a phone call which I had on tape  
23 stating that there's no need to worry, everything will be  
24 reinstated, there'll be no charges for insurance and you'll be  
25 covered.

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1 THE COURT: Okay.

2 MS. ROTH: And so there was a lot of confusion and --

3 THE COURT: I think I understand what you're saying as  
4 follows.

5 MS. ROTH: I have been with the company --

6 THE COURT: If I could just -- if I could just break  
7 in for a moment because --

8 MS. ROTH: Yes, sir.

9 THE COURT: -- I'm sympathetic to your situation but I  
10 have a docket that I need to move through. I need to find out  
11 if there are other objectors and we need to move forward with  
12 this morning's calendar.

13 It seems to me from what I've heard that you complain  
14 that you did not have adequate notice of today's hearing, that  
15 you want an opportunity to be able to express your opposition  
16 to the relief being requested in a more formal way in which you  
17 believe that it is unfair for you to be deprived of ongoing  
18 benefits under the plan that is before the Court.

19 Did I fully summarize your position?

20 MS. ROTH: Yes, you did.

21 THE COURT: Okay.

22 MS. ROTH: And I was under the assumption since I  
23 started at the very beginning with Lehman Brothers -- Inc. and  
24 went through every merger and acquisition, that I still have  
25 documents here saying I'm covered until I'm sixty --

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1 THE COURT: I think I understand the nature of your  
2 concern and I'm going to ask if there's anyone else who's on  
3 the phone who wishes to be heard, to express something  
4 different.

5 MS. ROTH: Thank you, Your Honor.

6 THE COURT: Thank you.

7 Is there anyone else who wishes to be heard on this  
8 point?

9 MS. ROTH: If I may add just one other issue? I think  
10 it would be fair and justice (sic) to have some type of Lehman  
11 representative set up to answer questions and I guess further  
12 explain the process and policies because there's so much  
13 documentation that's conflicting. And whomever I have called  
14 has -- have no assistance whatsoever.

15 THE COURT: Okay. I understand -- I understand the  
16 nature of your complaint. Thank you very much.

17 I'm going to give the debtor through counsel an  
18 opportunity to comment with reference to the individual  
19 objections that have been lodged, but only if counsel feels  
20 there's a need to comment.

21 MR. KRASNOW: No, Your Honor. We can't help but feel  
22 sympathetic for some of the concerns that have been expressed,  
23 but unfortunately, Lehman is where it is and we are not seeking  
24 relief today that really goes to the issues that these people  
25 have addressed and raised. but to make one thing clear in

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1       terms of one comment that was made, Your Honor, the -- there's  
2       nothing that we are doing nor that we currently contemplate  
3       doing -- we -- and it's not our plan, but that we contemplate  
4       doing with respect to the Aetna plan which is really the basis  
5       for which or through which these medical payments are being  
6       satisfied.

7                   That's it, Your Honor. We rest on our papers.

8                   THE COURT: Okay.

9                   Counsel for the Department of Labor made a comment  
10          that no one has responded to yet that perhaps this is a  
11          situation in which a committee should be formed to represent  
12          the interests of beneficiaries of the group benefit plan. At  
13          this juncture in this extraordinarily protracted and complex  
14          bankruptcy case which is heading next month toward a  
15          confirmation hearing, it is too late -- especially by oral  
16          request to be forming any kind of formal committee. But, I am  
17          concerned, particularly in reference to the written statements  
18          that have been filed with the Court and the statements that  
19          have been made by Mr. Delaney and Mr. -- Ms. Rasmussen in open  
20          court today, that this is a confusing situation for the  
21          individuals who are affected. Health care in the United States  
22          is a subject that the Supreme Court will be addressing next  
23          year. Courts of appeals throughout the United States have been  
24          addressing the Health care law; it's a very controversial  
25          subject and a subject that's politically grounded.

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1                   Here, we are talking about the private rights of  
2 individuals who don't fully understand, even the sophisticated  
3 ones, precisely what their rights are. Notwithstanding the  
4 fact that it has been represented forcefully and credibly in  
5 court that appropriate correspondence went out to notify  
6 parties who are beneficiaries of the VEBA as to the termination  
7 of benefits and the continuation of coverage that was  
8 substantially similar under what has been described as the  
9 Aetna plan.

10                  As I said at the outset and as Mr. Krasnow confirmed,  
11 the relief that is being sought today is fairly surgical and  
12 benign in relative terms. All that is happening, as I  
13 understand it, is that from a structural perspective, control  
14 of the entity that in turns controls the VEBA is being  
15 transferred from the trustee of LBI to LBHI and certain limited  
16 releases -- limited in a manner acceptable to the Department of  
17 Labor, are being exchanged. nothing in today's motion directly  
18 or indirectly affects the rights of any beneficiaries of the  
19 VEBA, however, it is clear from a fair reading of the motion  
20 and from the statements made by debtors' counsel that at some  
21 point in the future, it is foreseeable that LBHI will be taking  
22 steps, if permitted, under applicable law -- which is not  
23 bankruptcy law, to reimburse itself up to twenty-five million  
24 dollars from funds that are currently held by the VEBA in  
25 respect of certain health care payments made directly by LBHI

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1 to cover individuals who are otherwise subject to the  
2 protection of the group benefit plan.

3 It is really that twenty-five million dollar  
4 reimbursement that has been proposed but that is not part of  
5 the motion itself that I believe has generated most of the  
6 objections that we have heard today. Additionally, I believe  
7 that the objections are motivated by a profound sense of fear  
8 and insecurity as to what will happen to particularly  
9 vulnerable individuals who are dependent upon the health care  
10 benefits that are funded by the VEBA.

11 I am extremely sympathetic to the objections that have  
12 been raised and I recognize that counsel for the debtor has  
13 also expressed sympathy. In effect, however, those are hollow  
14 words because expressing sympathy does not provide any  
15 significant relief nor does it provide the information that the  
16 individuals appear to require.

17 I will grant the relief requested but I'm going to  
18 condition that relief upon something that may or may not be  
19 within my powers. I do not know whether or not I have any  
20 ability to direct that the trustee of the VEBA or those working  
21 at LBHI who are in control of the VEBA through Aceso, but I  
22 would like the individuals who are in a position to make a  
23 difference, to provide meaningful information to all of the  
24 beneficiaries, both current employees, retirees and those on  
25 disability, as to precisely what is going on, when action is

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1 going to be taken, it may affect their rights, and provide them  
2 with what amounts to a funded lawyer; a lawyer that can  
3 represent the interests of the classes of affected  
4 beneficiaries so that those separate classes can be advised in  
5 a thoughtful and understandable way as to what their rights  
6 are. And it seems to me -- and I may not have every class  
7 clearly in mind, but the three classes that may need separate  
8 representation; by (sic) those who are current employees, those  
9 who are retirees and those who are on disability. It may be  
10 that those who are on disability and those who are retirees  
11 fall into the same category. But I am not satisfied simply at  
12 proving what amounts to a benign transaction in a setting that  
13 includes so much obvious pain and concern on the part of those  
14 who are looking to the VEBA as a source of Health care  
15 coverage.

16 Now, having said what I've said, I do not mean to  
17 overstep my prerogatives and jurisdiction. For that reason,  
18 I'm conditioning this on not an order from the Court, but a  
19 strong suggestion with a request for voluntary compliance. I  
20 won't enter the order unless and until I hear a report as to  
21 whether or not what I have suggested can be arranged. If it  
22 can't be, for good reason, I'll reconsider the conditions I've  
23 imposed.

24 If there's anyone who wishes to say anything in  
25 response to what I've said, this is the time to do it.

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1 Otherwise, we're going to move on to the next agenda item.

2 MR. KRASNOW: Thank you, Your Honor. Your Honor, I  
3 believe the -- we've concluded the Chapter 11 debtors' portion  
4 of the agenda, so I will turn it over to the representatives  
5 for the SIPA trustee.

6 MR. SALZMAN: Good morning, Your Honor. My name is  
7 Michael Salzman. I'm from Hughes, Hubbard & Reed and I am here  
8 for the SIPA trustee. And my part of the activity today  
9 concerns the motion that the Providence funds made for a  
10 schedule to proceed with litigation and I believe, therefore,  
11 that Mr. Molton, on behalf of Providence, would be the  
12 proponent of the motion and, therefore, it occurs to me that  
13 Mr. Molton would be next up.

14 THE COURT: He is, in fact, on his way.

15 MR. MOLTON: Thank you, Mr. Salzman. Good morning,  
16 Your Honor. David Molton of Brown Rudnick here with Howard  
17 Steel for the four Providence funds which I'll call the funds.  
18 Your Honor, I'm going to be brief. I think our papers  
19 adequately set forth our situation. I'm going to -- I know, as  
20 Your Honor knows, since the commencement of this case three  
21 years ago, the funds have been persistent in asking for prompt  
22 progress and determination of their disputed customer status.

23 We're not being told, reading my friend Mr. Salzman's  
24 papers, that we have to, according to them, wait until sometime  
25 in 2013 before our issue is even teed up, until there's a

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1 determination of a disputed house claim by LBIE which may  
2 implicate, arguably, some of our securities and then, possibly  
3 thereafter, later in 2013, second quarter, where the omnibus  
4 claim, to the extent it does not get resolved, is teed up. I  
5 think, Your Honor -- and I'll get to it in a minute -- our  
6 situation is wholly independent of those issues.

7 But in any event, Your Honor, that's too long and  
8 those proceedings, as I'm going to contend and submit, are  
9 irrelevant. We're asking, Judge, that this argu -- that our  
10 motion or our dispute as to customer status be teed up  
11 relatively quickly. I know certain people objected to our  
12 proposal for an early 2012 tee up. Needless to say, we're  
13 willing to work with our friends on the other side in terms of  
14 a schedule but it would be a prompt schedule.

15 I'm not going to get into the merits of the argument,  
16 Your Honor. They've got their position, we've got ours. Your  
17 Honor's seen it, Your Honor has seen it last year, Your Honor  
18 saw it a couple of years ago when I stood up here. Suffice it  
19 to say there's a dispute. That dispute is one that we believe  
20 can be -- is mostly a legal dispute and one that can be  
21 resolved relatively quickly on an accelerated hearing schedule.

22 We don't have any other remedy, Judge, but to come  
23 here three years now. And I know Your Honor has seen me  
24 intermittently in that time asking, on occasion, for the same  
25 thing. But we have no other remedy other than to come here and

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1 ask for Your Honor's intervention in this in order to compel  
2 the trustee to tee up this motion concerning folks who has a  
3 contractual relationship with them and argument is we're  
4 customers of LBI.

5 THE COURT: Mr. Molton, let me just break in --

6 MR. MOLTON: Yes.

7 THE COURT: -- and ask you a fundamental question.  
8 This is really a request to jump ahead of some other matters  
9 that are on the LBI docket in a manner that, at least the  
10 trustee argues, in fundamentally inefficient because many of  
11 the same issues that you're concerned with are tied up in the  
12 LBI house claim. And my question to you is why is it efficient  
13 to do what you're proposing? I understand your clients are  
14 impatient and you have a job to do. Why does that mean that I  
15 should do anything special for you?

16 MR. MOLTON: Well, first of all, Judge, we're not  
17 asking -- we don't think it's special for us. We think that,  
18 pursuant to the way Your Honor's case managed this case, an  
19 omnibus hearing can be teed up that would affect all alleged  
20 300s similarly situated, folks who are like us. Indeed, a year  
21 and a half ago, we submitted, on their request, a stipu -- a  
22 proposed stipulation of uncontested facts that would guide that  
23 hearing to resolve these legal situations.

24 But let me get to the crux and the gist of your  
25 matter, Judge. We don't believe that these issues are tied up

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1 in the other claims. We believe SIPA, first of all, requires  
2 them to timely adjudicate our customer status. The  
3 finalization of that status, Your Honor is -- affects issues  
4 that are wholly independent from the adjudication of the house  
5 claim or the omnibus claim. First of all, it will affect our  
6 right to get advances from SIPA which may be one of the reasons  
7 why they want to deny us customer status. Because if they just  
8 hold LBIE to be the customer and not these 300 other folks who  
9 we argue also enjoy customer status --

10 THE COURT: You said you weren't getting to the  
11 merits, Mr. Molton.

12 MR. MOLTON: Okay. Put it aside. I'll get it aside.  
13 But it affects our distribution right. To the extent there are  
14 interim debtors, which we hope there are, it would affect our  
15 clients right to those interim distributions to have  
16 finalization as to the adjudication of our status. It affects  
17 how we deal, Your Honor, with the ongoing LBIE proceedings and  
18 the allegations or the position that were found in that matter.  
19 To have finalization and adjudication of our customer status  
20 will allow our clients to finally understand their rights in  
21 this proceeding and make decisions as to how they will go  
22 forward to resolve situations globally across the board.

23 We think we're entitled to it under the statute, Your  
24 Honor. We don't believe, as our friends from the committee put  
25 in their paper, that there's any connection between the

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1 resolution of the LBIE claims, whether it be the house claim or  
2 the omnibus claim, in connection with the resolution of what we  
3 believe, again, Your Honor, will be a very legally oriented  
4 decision by this Court on pretty well undisputed facts. We're  
5 not asking for preferential treatment, we're not asking to be  
6 put ahead of anyone, Your Honor. We're asking that our claim  
7 be adjudicated. We're asking Your Honor to include all of  
8 those similarly situated.

9 First of all -- and in light of what I said, Your  
10 Honor, for the trustee who has fiduciary duties to timely and  
11 promptly pursue and adjudicate and resolve customer claim  
12 status -- customer claims -- disputed customer claims, to say  
13 the resolution of our claim would be meaningless, is just, from  
14 our perspective, a frivolous argument. And we're very  
15 concerned, Judge, that we're being strung along, that to some  
16 extent we find ourselves between a rock and a hard place, that  
17 we're being a pinball between the various self-motivated claims  
18 of these two brokers, one in the United States and one in  
19 England, who are using us and delaying the adjudication of our  
20 claim to our detriment for whatever their negotiating, as  
21 they've been negotiating for now over three years to resolve  
22 claims between them.

23 Again, I think that's it, Judge, unless Your Honor has  
24 any further questions, I'll rely on our papers and really ask  
25 that we have our day in court.

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1 THE COURT: Okay.

2 MR. MOLTON: Thank you.

3 THE COURT: Thank you.

4 MR. SALZMAN: Michael Salzman again. The fundamental  
5 premise that Mr. Molton puts forth, that his claim is wholly  
6 independent of the LBIE omnibus claim is false on its face.  
7 It's the same exact property. The omnibus claim was made by  
8 LBIE precisely on behalf of Mr. Molton's clients and 299 other  
9 funds. And we've spent the last three years with LBIE  
10 reconciling positions to come to where we are. It's not the end  
11 of the road and we're very sorry that it's not the end of the  
12 road and we recognize the responsibility to move to the end of  
13 the road.

14 But we've gotten to the place we are by dint of  
15 comparing the LBIE books and records with the LBI books and  
16 records. There were almost 200,000 different claims that had  
17 to be dealt with in Lehman week. We've dealt with them. We're  
18 now in the process of taking, really, I would say, two  
19 important steps that are going on simultaneously. One is to  
20 litigate the remaining legal issues with LBIE if they cannot be  
21 agreed upon and, at the same time, as our papers indicate, we  
22 have started, I want to say, trial logs, three way discussions  
23 with people such as Mr. Molton's clients, other of those funds  
24 that are direct claimants into LBIE and on behalf of whom LBIE  
25 has made the omnibus claim to us, to give those people an

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1 understanding of what's involved and to make sure that they are  
2 satisfied, to the extent they can be, with -- that the books  
3 and records accurately show what occurred and if they have any  
4 differences to let us know and work that out.

5 But it is fundamentally wrong to say that this case  
6 can progress in any meaningful way by separately working in  
7 this court and having discovery and litigation with these 300  
8 different claimants. And it would -- as LBIE agrees with us on  
9 this point, if you saw their paper filed yesterday. The issues  
10 are -- they say intertwined; I would say they're largely the  
11 same, not just intertwined, as to was particular security here  
12 or there? And I submit, Your Honor, that it would be a  
13 profound mistake to get us off track now with these 300 other  
14 people.

15 THE COURT: Well, okay, let me just break in and ask  
16 you a question that's relatively straightforward. It's simply  
17 about timing. I view the motion being pressed by Mr. Molton as  
18 primarily growing out of a strong sense of frustration that  
19 this process has been dragging on for too long and that unless  
20 he, for the benefit of his clients and others who may be  
21 similarly situated, jumps in and says to me please do something  
22 about this, this is going to go on indefinitely and he has no  
23 control over his fate, his client's fate. What do you say to  
24 that? And a subpart; why can't this be carved out of the LBIE  
25 claim? Why can't there be some separate determination that all

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1 of these 300 or so hedge funds that have the same kind of  
2 contractual relationship, both with LBIE and LBI, can have at  
3 least their customer status issues resolved? What's wrong with  
4 that?

5 MR. SALZMAN: The omnibus claim -- the allowance of  
6 the omnibus claim gives these people what they're entitled to  
7 insofar as they could have customer status. We think it's  
8 clear by definition, according to the books and records,  
9 they're 056 accounts. That means they were customers of LBIE,  
10 not of LBI.

11 THE COURT: Is that really determinative? I mean, I  
12 know I saw that in your papers and I know that, from an  
13 internal perspective, that kind of coding may be significant  
14 but does it really determine that ultimate legal question?

15 MR. SALZMAN: I think it's not, by itself -- it's not  
16 a hundred percent but it's close to a hundred percent. And  
17 beyond that, where we've been going these last three years in  
18 working with LBIE to reconcile the positions would be a  
19 futility, frankly, if these people were now going to start over  
20 and press direct claims. We think that the way -- the fastest  
21 way home, frankly, is to resolve the LBIE, LBI issue. At that  
22 point, the 8.3 billion dollars that's up on the table will be  
23 allocable. If it's more or less, based on whatever Your Honor  
24 decides, so be it.

25 And at that point, we believe -- and we believe that

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1 almost all of the other 300 people -- and I think it's notable  
2 that, to this point at least, only Providence is on this motion  
3 today -- that these other people recognize that if we work with  
4 them, LBIE takes up the cudgels for them, to the extent there's  
5 a disagreement, that that will get us home and that the 300  
6 other people who have all -- most of whom have made direct  
7 claims in this court, did so largely for protective reasons; we  
8 won't have to litigate any of those things. And we're  
9 anticipating, as Mr. Kobak put in the interim report recently,  
10 that instead of having these 300 people in court here  
11 litigating, that once the omnibus claim is done, that we're  
12 done.

13 THE COURT: Okay. Well, you've just said something  
14 that makes it sound pretty simple. Once it's done, we're done.  
15 Well, what's the process for getting that done? That's an  
16 enormously protracted, fact-specific process that, I think,  
17 runs out over something like eighteen months.

18 MR. SALZMAN: But the reality, Your Honor, is that  
19 getting a short answer test question answer to the question do  
20 the --

21 THE COURT: Does this mean that this group has to wait  
22 eighteen months before they can do anything? Because if that's  
23 what you're saying, I suspect they're going to be saying in  
24 response that's awfully long to have to wait, isn't it?

25 MR. SALZMAN: It's --

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1                   THE COURT: And we have issues that we assert are  
2                   separate and apart from this distracting other issue. We just  
3                   want to know whether we're customers and why can't we do that  
4                   now? What's the answer to that?

5                   MR. SALZMAN: Well, the most direct answer, without  
6                   being flip in any way and being respectful, is that --

7                   THE COURT: Respectful of whom?

8                   MR. SALZMAN: Of both Your Honor and of these people  
9                   and their interests. Is that knowing the answer to that  
10                   question does not advance the ball. The omnibus claim --

11                   THE COURT: But it may advance the ball for them. I  
12                   think what they're saying is we understand that the trustee is  
13                   focused on the LBIE claim, big numbers there, and believes that  
14                   if they can resolve that, since we're included in that  
15                   universe, that this will all go away more neatly. I think they  
16                   understand the argument you've made but they're saying  
17                   something else. They're saying we're customers and have rights  
18                   in the LBI case. And we want to have those rights determined  
19                   and vindicated and we don't want to wait for what we say is a  
20                   collateral issue. I think that's their argument. Don't you  
21                   think that's their argument?

22                   MR. SALZMAN: I do think that's their argument.

23                   THE COURT: So why -- what's wrong with that argument?

24                   MR. SALZMAN: What's wrong is that it does not advance  
25                   the ball in terms of their getting anything. We still have to

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1 determine the omnibus claim. It's the same exact CUSIPs, it's  
2 the same exact positions, it's the same exact cash and it's  
3 illogical to do anything with them and give them anything,  
4 promise them anything, represent anything to them until that  
5 issue is resolved.

6 When Mr. Molton refers to -- criticizes us for saying  
7 it would be meaningless, I think what we're trying to convey is  
8 that there is a process, it is systematic, it's going to -- it  
9 deals with their property and we're going to get it to them.  
10 But having separate discovery as to -- their contention, for  
11 example -- and Province is one of some people but not a  
12 majority of people who are saying well, we really did business  
13 in New York. We don't recognize the fact that we -- this other  
14 contract with LBIE has anything to do with it.

15 To get a trial on that subject is collateral. To have  
16 discovery about that is collateral. It's not something that  
17 can be addresses in a paper without discovery. They themselves  
18 acknowledge that they're asking for discovery and so on.

19 THE COURT: I think they say limited discovery.

20 MR. SALZMAN: Yes. But the books and rec -- I mean,  
21 where we are right now is the books and records say 056,  
22 London, they got account statements from London and trying the  
23 issue of to what extent beyond the, let's say, ninety-nine  
24 percent that the books and records and those account statements  
25 are determinative, just takes us spinning way out from the

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1 process that'll actually get us to getting them their property.

2 THE COURT: I understand that to be your position. I  
3 want to hear from Mr. Molton on something.

4 MR. SALZMAN: Thank you.

5 MR. MOLTON: Your Honor.

6 THE COURT: Having heard what I just heard --

7 MR. MOLTON: Yes.

8 THE COURT: -- how are you and your clients benefitted  
9 in a meaningful way by having a separate litigation over your  
10 customer status as to LBI when the very same CUSIPs, as I  
11 understand it, are tied up in another proceeding altogether  
12 which has a long timeline to resolve?

13 MR. MOLTON: I'll answer that, Your Honor. And I'm  
14 going to answer it by referring to the fact that one thing my  
15 friend Mr. Salzman didn't say is at the end of this long  
16 process, we'll treat you as customers in this proceeding. He  
17 doesn't say that for a reason. Because it's not their intent  
18 to ever try and concede that issue. What they intend to do --  
19 and if you listen to it carefully, it's not the vindication of  
20 our rights in this proceeding or it's not even a timely  
21 adjudication of our status in this proceeding but it's  
22 adjudicating what the LBIE omnibus claim is and go over there.  
23 That's where you belong. Not that we have rights in this  
24 proceeding.

25 And what he doesn't say is it's not apples and apples.

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1 I'm not an English lawyer but I understand that in the LBIE  
2 proceeding, because LBIE hypothecated immediately before the  
3 insolvency and their filing, a good deal of all of these  
4 securities, whether or not there were margin balances or not,  
5 we would be treated over there as general unsecured creditors  
6 which is something that I think LBIE would like.

7 Here, we have preferred customer status, if Your Honor  
8 decides we're a customer. And our whole point the last three  
9 years has been to say we believe the statute contemplates this  
10 too. There could be two customers regarding the same disputed  
11 property. Indeed, Section 78fff-3(a)(5), as Your Honor  
12 knows -- and I think Judge Lifland commented about that statute  
13 recently regarding the feeder funds in the Madoff proceeding  
14 which he said because they weren't broker-dealers or bankers,  
15 that doesn't apply. But we're accorded customer status in this  
16 proceeding under that provision, entitled to advances from  
17 SIPA, notwithstanding that we may have been also a customer at  
18 LBIE.

19 So it's significant to me, when you actually peel back  
20 the layers of what they're saying, to look at what they're not  
21 saying. They're never going to concede -- they don't say hey,  
22 at the end of their dance with LBIE, you know, we're going to  
23 give you customer status but everything's going to be resolved.  
24 They don't say that. Because that's not what their position is  
25 going to be. We want -- we're entitled per the statute to

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1 have, as Your Honor said, our rights vindicated here. We're  
2 asking for a determination of status. I think that that's a  
3 separate, distinct issue, recognized by the statute -- and  
4 indeed, if Your Honor -- I don't want to get into merits but I  
5 think the Second Circuit's decision in Madoff and what it  
6 defines as customer, touches a number of undisputed facts here  
7 that pulls us into that status. But I'm not going to go there;  
8 just responding to my friend's point.

9 But that's the reason why, Judge. What they're doing  
10 vis-a-vis LBIE and its claims and the house claim concerns  
11 arguably their property and also the house claims to the extent  
12 the house claim includes hypothecated securities that are ours  
13 and the trustee wins on the denial of that claim in this  
14 proceeding? Which means that they're regulated to general  
15 unsecured creditors vis-a-vis that claim in this proceeding.  
16 They're probably going to get no distribution. We don't have a  
17 remedy. If that's where our property is. And we don't know  
18 that. We say well, they speculate that it is, they speculate  
19 that it isn't, nobody's told us yes or no.

20 And I just want to put up the fact that every time I  
21 appear here -- well, we're talking to people. We're talking to  
22 people like you. Yes. Sometimes they call us. You know, Mr.  
23 Warnot, who I know, has had my papers for a number of weeks.  
24 I've seen him on other matters. I got his paper yesterday  
25 where he says I'd be glad to call Mr. Molton and talk to him.

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1 The bottom line, Judge, is we're entitled to have, as Your  
2 Honor said, our rights vindicated in this proceeding. We don't  
3 believe it's going to be -- in the scheme of the resources that  
4 have been allocated to attorneys in this case, it's de minimis.  
5 And I think Your Honor can get on with it, can make that  
6 determination and I think that the determination of those 300  
7 customers who have this situation, which can be done on an  
8 omnibus fashion, will facilitate these guys talking to each  
9 other and coming to some resolutions.

10 In any event, that's all I have to say unless Your  
11 Honor has any other questions.

12 THE COURT: Okay. Is there more from anybody?

13 MR. WARNOT: Your Honor, may I be heard? I'm from  
14 LBIE.

15 THE COURT: Of course.

16 MR. WARNOT: James Warnot from Linklaters for LBIE. I  
17 do agree with one thing that Mr. Molton said, that this is  
18 taking way too long. But most of the other things he said I  
19 disagree with. In fact, the funds are LBIE customers. They've  
20 put claims into the LBIE proceeding, they've entered into a  
21 claims resolution agreement which is a very, very complicated  
22 document as to how their claims will be dealt with, including  
23 the impact of any recovery in this proceeding, we have asserted  
24 claims on their behalf in the omnibus proceeding and so, in  
25 fact, we think that's where the merits would ultimately come

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23 the impact of any recovery in this proceeding, we have asserted  
24 claims on their behalf in the omnibus proceeding and so, in  
25 fact, we think that's where the merits would ultimately come

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1 out.

2 To respond to one of the questions that you posed  
3 earlier, I don't think it's quite as simple or that all 300 are  
4 similarly situated, such that a preliminary determination could  
5 be made of their customer status, whether they're LBI  
6 customers. Frankly, if they're LBI customers and they want to  
7 drop their claim against us, then maybe that's okay. But  
8 you've got to look at the suite of contracts which are not the  
9 same for all 300. In fact, even the versions changed over  
10 time. You've got to look at some of these internal procedures  
11 that Mr. Salzman alluded to, how the accounts are designated,  
12 where the account statements go and you've got a whole course  
13 of dealing as to how these clients dealt with Lehman over the  
14 years. And we think it's clear that that points to LBIE  
15 customers for the very vast, vast majority of them.

16 So you can't say that our omnibus claim, which is  
17 asserted solely on behalf of these 300 or so hedge funds and as  
18 to which the recoveries will go to those customers, are not  
19 related with the claims that these 300 are trying to assert.  
20 And we just don't see how you can litigate those two things at  
21 the same time. We are pushing for as fast a schedule as is  
22 possible with LBI. We filed our objection on the 31st of  
23 October. We're negotiating a litigation schedule now.

24 But with re -- one thing that could advance the ball  
25 with respect to many of these individual customers, including

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1 Mr. Molton's customers, are to talk about it. To understand  
2 precisely what their claim is into LBIE, what their claim is  
3 into LBI, what they owe LBIE under the margin lending agreement  
4 that will cover many of the issues that Mr. Molton is referring  
5 to and what is in the omni claim on their behalf. So for all  
6 those reasons, we believe that the relief requested by Mr.  
7 Molton doesn't simplify things but, in fact, overly complicates  
8 them.

9 THE COURT: Okay. Does the committee have anything to  
10 say on this?

11 MR. O'DONNELL: Of course, Your Honor. Your Honor,  
12 Dennis O'Donnell, Milbank Tweed Hadley & McCloy. We did file a  
13 statement in support of Mr. Molton's motion. We did so because  
14 I think approximately three years ago, on October 13th of '08,  
15 we filed a pleading in opposition to the first motion that was  
16 made for discovery here. I felt strongly at the time that all  
17 of things that have been said by the LBI trustee and by the  
18 LBIE trustee here made sense; that there was a process that  
19 should unfold here.

20 But it is three years later and I think what Your  
21 Honor has said as well, we agree with entirely which is that  
22 there are separate issues here. I've heard it said several  
23 different ways here but I -- from a very basic -- you know,  
24 without -- with limited visibility and to all the facts and  
25 circumstances here, but from a very basic perspective here. It

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1 would appear that there are, in fact, two sets of contractual  
2 relationships here. They can be dealt with separately. They  
3 should be evaluated separately.

4 The LBI trustee has issues letters of determination  
5 with respect to all of the LBI claims and there are -- there's  
6 a process for objecting to that -- whatever the  
7 determination -- and having it decided by that court. And I  
8 think what Mr. Molton is saying is that that process, which  
9 affects only this Court, should be allowed to play out in this  
10 Court.

11 THE COURT: Mr. O'Donnell, let's me just ask you  
12 something very basic. This would appear to be a matter as to  
13 which the committee does not have a dog in the fight. Why are  
14 you here?

15 MR. O'DONNELL: Your Honor, we're here as we have been  
16 before on other LBI related matter because, as I think Your  
17 Honor said very early in the case, that there is a semi-  
18 permeable membrane between the LBIE case and the LBI --

19 THE COURT: But how is the committee affected by this  
20 question of how to deal with --

21 MR. O'DONNELL: The committee --

22 THE COURT: -- the interests of these hedge funds.

23 MR. O'DONNELL: The committee is affected by who winds  
24 up being a customer and not a customer in the LBI case and we  
25 had, for the most part, ninety-nine percent of the time, been

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1 on the same page as the LBI trustee as to how to handle the  
2 treatment of customer claims. We, a few weeks ago, filed a  
3 statement in support of their approach to the TBD claims -- TBA  
4 claims, rather, and have worked with -- you know, worked  
5 constructively with the LBI trustee. Because we view the LBHI  
6 estate as a beneficiary of -- a residual beneficiary of that  
7 estate which would benefit our creditors. So I think we do  
8 have -- we have had all along that interest is how things  
9 develop at LBH -- at LBI and view this as a situation where we  
10 just disagree as to how the treatment should be -- how these  
11 claims should be treated.

12 THE COURT: Okay. Thank you. Is there more?

13 The fallback relief requested in the Providence motion  
14 is that we conduct a status conference under Section 105(d).  
15 And I'm prepared to do that sometime after the confirmation  
16 process has run its course in the LBHI case. I don't know what  
17 the right date is for scheduling that status conference but for  
18 discussion purposes only, let's say that next omnibus hearing  
19 after whenever a confirmation order is entered, assuming one is  
20 entered.

21 If a confirmation order is not entered, we'll have it,  
22 say, in February of 2012 with the understanding that between  
23 now and then -- and the holidays are upon us; that probably  
24 means in January -- the parties will endeavor, through good  
25 faith meet and confer sessions, to achieve something

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1 approaching light if not heat, with respect to the possible  
2 acceleration of the determination of customer status, in a  
3 manner that will not complicate or delay resolution of the  
4 omnibus claim but by LBIE.

5 I have heard all of these arguments. I've reviewed  
6 the papers that have been filed. There is a level of  
7 complexity to this that I'm not sufficiently fluent at this  
8 point to address with the kind of thoughtfulness that it  
9 deserves. It troubles me that there's an even split here with  
10 two respected lawyers saying we can do this and two respected  
11 lawyers saying we can't do this. Or at least we can't do it  
12 efficiently. I don't have a sufficient clarity of vision at  
13 this point as to who's right.

14 And so I would like the parties to try to see if they  
15 can persuade the other side, perhaps, either that there is  
16 merit to waiting to merit to bifurcating. And you can provide  
17 me with a status report and I can provide you with some  
18 comments when next we're together on this subject. It seems to  
19 me that it would be useful, to me, if the parties could submit  
20 position papers, with respect to the matters that have been  
21 discussed, that can be in the form of simple correspondence  
22 that is docketed, sometime prior to the status conference. I'm  
23 not setting a date. A day or two before. Thereby giving me  
24 some advanced notice as to what the issues have turned out to  
25 be.

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1                   Mr. Krasnow, you've returned to the room. Does that  
2 signify anything?

3                   MR. KRASNOW: Your Honor, it simply signifies, I  
4 think, that we may be at the conclusion of this morning's  
5 agenda.

6                   THE COURT: That's a good thing. We're adjourned  
7 until 2 o'clock.

8                   (Recess from 12:07 p.m. until 2:06 p.m.)

9                   THE COURT: Be seated, please. Good afternoon.

10                  MR. ROSEN: Thank you, Your Honor.

11                  THE COURT: I think the only matter on this afternoon  
12 is the motion to dismiss in Uvino v. Lehman, so let's proceed  
13 with that.

14                  MR. BAER: Good afternoon, Your Honor, Lawrence Baer,  
15 Weil, Gotshal & Manges, on behalf of Lehman Brothers. Your  
16 Honor, I will assume familiarity with background facts in this  
17 case based upon the prior motion practice and the Court's May  
18 decision. Just like to add a couple of highlights of our --  
19 the arguments set forth in our papers.

20                  The quantum meruit argument that plaintiff makes in  
21 this case is, essentially, unchanged from the quantum meruit  
22 argument that was made in the original complaint. In fact,  
23 it's striking from a comparison of the blackline that I ran  
24 between the original complaint and the amended complaint there  
25 were no changed allegations with respect to quantum meruit. On

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1 its face, the quantum meruit allegations apply to the  
2 commitment letter. That is a claim that this Court has  
3 previously dismissed; that is a -- the work of plaintiff,  
4 covered by the original commitment letter, which expired on  
5 December 31, 2009.

6 Plaintiff, in response to our motion to dismiss, said,  
7 well, you know, we'll stipulate that the -- this new quantum  
8 meruit claim set forth in the amended complaint applies only to  
9 that period covered by the renewal commitment letter, that  
10 being January 1st, 2010 to June 2010. The fact of the matter  
11 is the complaint says what the complaint says, and it is  
12 improper to amend one's pleadings through a brief.

13 THE COURT: I saw that. But it's apparent to me that,  
14 perhaps, through inartful pleading, perhaps, through lack of  
15 diligence, perhaps, through error, there was a failure to do  
16 that which the previous decision and order required. But  
17 you're not prejudiced. And I'm not going to make that the  
18 reason for dismissal, so you --

19 MR. BAER: Well --

20 THE COURT: -- shouldn't spend a lot of time there.  
21 I'm going to deem the complaint amended so that it complies  
22 totally with the Court's earlier decision. It can't be  
23 otherwise.

24 MR. BAER: As the Court is aware, the simple -- the  
25 procedural argument is not our only argument with respect to

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1 the quantum meruit count set forth in the amended complaint.  
2 What is clear based upon the established case law in New York  
3 and as construed by the federal courts is that in order to  
4 succeed on a claim for quantum meruit, the plaintiff must have  
5 a reasonable expectation of increased compensation: not merely  
6 an expectation, a hope, a subjective belief that is  
7 unreasonable, but a reasonable expectation of increased  
8 compensation. Here it's undisputed, as pled in the amended  
9 complaint, that, certainly, as of December 3rd at the latest,  
10 2009, when Lehman Brothers presented to Ms. Uvino the proposed  
11 amended -- or excuse me, the proposed renewal commitment  
12 letter, that the terms of her compensation were set going  
13 forward.

14 The plaintiff attempts to argue in its opposition  
15 papers based upon lots of back and forth that took place in  
16 2009 preceding the presentation of the renewal commitment  
17 letter, the handwritten comment on the original commitment  
18 letter about the review and a potential for bonus potential.  
19 But all that's irrelevant because as of December 3rd, 2009 when  
20 Ms. Uvino received the renewal commitment letter, there was no  
21 doubt whatsoever based upon the pleadings that there was no  
22 reasonable expectation of increased compensation. And indeed,  
23 she said, well, if that's the case, I'm going to leave; I'm  
24 going to get another job. So for the reasons set forth in our  
25 brief and as I've just highlighted, that essential element of

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1 the quantum meruit is lacking --

2 THE COURT: Let me ask you --

3 MR. BAER: -- in the amended complaint.

4 THE COURT: Let me ask you a question as to how as a  
5 purely intellectual matter one gets to the conclusion that that  
6 element is lacking on a motion to dismiss as opposed to  
7 following a period of discovery, which includes the testimony  
8 of the people who were involved in the actual negotiation and  
9 drafting of the commitment letter; as well as the state of mind  
10 testimony of the plaintiff herself. If you're talking about  
11 reasonable expectation, it's not clear to me how that is  
12 inferred in the absence of any record.

13 MR. BAER: Your Honor, first of all, the negotiation  
14 with respect to the original commitment letter, I would submit,  
15 respectfully, is irrelevant. What we're talk -- that -- the  
16 Court has already dismissed that claim. What we're talking  
17 about is the period subsequent to the expiration of the  
18 original commitment letter, which is January 2010 to --

19 THE COURT: Forget the period of time for a moment  
20 because what we're talking about is an element of the cause of  
21 action of quantum meruit. And you said in your papers and  
22 you're saying now that, in effect, there is no plausible cause  
23 of action that can be asserted for quantum meruit because under  
24 no set of facts could this plaintiff have a reasonable  
25 expectation of additional compensation, correct?

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1 MR. BAER: Yes, Your Honor.

2 THE COURT: That's my question to you purely as a  
3 intellectual proposition. Forget the case law; forget the  
4 timeline.

5 MR. BAER: Okay.

6 THE COURT: We're talking now about the element of a  
7 cause of action. How is it possible to conclude on a motion to  
8 dismiss where I must accept as true everything that has been  
9 pleaded in the complaint that this plaintiff had no reasonable  
10 expectation? How do I do that as a matter of law?

11 MR. BAER: Your Honor, you may rely on the plaintiff's  
12 own words. In the amended complaint at paragraph 50, she says  
13 that on or about November 30th, 2009 she reviewed -- I'm  
14 extrapolating because it's not the actual words -- Hershan also  
15 reviewed -- Mr. Hershan was her boss -- also reviewed with  
16 plaintiff the renewal terms of a second commitment period  
17 beyond December 31, 2009. On or about December 3rd, 2009,  
18 Hershan hand delivered to plaintiff a renewal commitment  
19 letter, a copy of which is annexed to the complaint, which sets  
20 forth the terms of compensation going forward.

21 Plaintiff did not sign the commitment letter because  
22 she continued to disagree with the compensation. Now, she also  
23 states in her papers that she said, well, if you're not going  
24 to increase my compensation, I'm going to leave. She knew as  
25 of December 31 that it was a done deal.

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1                   The -- she had pled her case throughout 2009 as set  
2 forth in the pleadings. I'm not asking Your Honor to guess  
3 what was going on here. There is -- can be no other reasonable  
4 interpretation of the facts as pled by this plaintiff.

5                   She went back and forth with her boss. She pled with  
6 him that she was underpaid, that the terms of the job had  
7 changed, whatever her reasons were for trying to get additional  
8 compensation. Her boss ultimately sat down with her, gave her  
9 her review, said, "That's all very well and good, but I'm not  
10 going to give you more money. Here are the terms going  
11 forward."

12                  She continued to work under those terms. I mean  
13 quantum meruit is not a doctrine where every employee who  
14 believes he or she should be paid more gets to, you know, after  
15 termination try to rejigger the numbers or renegotiate the  
16 deal; otherwise, every employee at will would be doing that.  
17 It's only where the plaintiff for this -- and in particular for  
18 this period of time had any sort of reasonable belief, was lead  
19 to believe, that she would get more. She had pled her case.  
20 She was told no more. She was not only told no more, she was  
21 given a piece of paper that said no more, these are the terms.

22                  THE COURT: But she didn't sign the continuation  
23 commitment letter.

24                  MR. BAER: She didn't sign. That's correct. If --

25                  THE COURT: So couldn't she have -- and this is really

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1 the proposition that I'm discussing with you now.

2 MR. BAER: Yes, Your Honor.

3 THE COURT: Couldn't she have the reason of: "Well, I  
4 didn't sign this. I'm doing work that's well beyond what was  
5 originally contemplated. This group I'm now working for has  
6 grown in size because of the needs of the reorganization."

7 "My responsibilities are significantly greater than  
8 they used to be. I'm not signing this. I'm going to look for  
9 another job, and I'm going to pursue claims for quantum  
10 meruit." Couldn't she have that subjective intent?

11 MR. BAER: Her subjective intent is only a relevant  
12 consideration for the Court to the extent it was a reasonable  
13 subjective intent.

14 THE COURT: Well, how do I -- that's really what I'm  
15 dealing with here.

16 MR. BAER: Yes.

17 THE COURT: My question to you is the same question.  
18 It's a motion to dismiss.

19 MR. BAER: Yes.

20 THE COURT: There's no discovery. You don't have  
21 anything that you're relying on to say, see, this is what she  
22 said in her deposition. You're looking at her complaint,  
23 something that presumably Mr. Rosen prepared. It's not as if  
24 this is a state court pleading; this is a federal pleading.

25 MR. BAER: I understand, Your Honor. We --

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1                   THE COURT: So, just as a purely theoretical  
2 proposition, how do I get to where you want me to be by  
3 determining under no set of reasonable circumstances could she  
4 have believed that she had the possibility of getting  
5 additional compensation for her work?

6                   MR. BAER: Your Honor, not just relying on the  
7 complaint, but the documents attached to the complaint.

8                   All right. The renewal commitment letter, which is  
9 admitted --

10                  THE COURT: But she didn't sign it.

11                  MR. BAER: She didn't sign it, correct. From that  
12 point forward, she continued to show up to work. She -- if she  
13 wanted to, and this is what quantum meruit was all -- is all  
14 about, she could quit, say: "You know what, I've been asking  
15 for more money all year long."

16                  "I didn't get it. You now are trying to re-up me for  
17 a renewal period. I've asked for more money for the renewal  
18 period. I'm leaving."

19                  And in fact, that's what she did do. She began a job  
20 search at least as alleged. And if she began a job search,  
21 that itself is evidence that she had no expectation.

22                  THE COURT: No, it's not. It's evidence that she  
23 wanted to get out; it's not evidence that she had no  
24 expectation that while she was there she might earn more money.

25                  MR. BAER: The fact of the matter is, Your Honor, as

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1       pled -- I'll come back to that. I just want to address one  
2       other point that was addressed -- or that was made or implied  
3       in the Court's question about the larger job. There's no  
4       allegation in the complaint that the job changed between the  
5       end of December 2009 and January to June 2010.

6               The argument about the increased responsibilities, and  
7       it was more than she bargained for; and it was going to be a --  
8       you know, a none event liquidating a debtor with, you know, for  
9       a short period of time, no employees, no HR functions, all of  
10       that occurred in the period before December 31st, 2009. That  
11       was covered by the commitment letter not the renewal commitment  
12       letter. So her job didn't really change at all from December  
13       31st to January 1st.

14               So her -- the expectation that she would get -- be  
15       paid more based upon increased responsibilities under the  
16       renewal commitment letter is also unreasonable because the job  
17       responsibilities under the renewal -- under the commitment  
18       letter, which -- with which she was clearly not satisfied,  
19       didn't change in the renewal period. There were the same  
20       larger jobs -- larger responsibilities, more than she had  
21       bargained for, I mean, assuming all of the facts as pled are  
22       true.

23               THE COURT: Okay. Let's just assume all the facts  
24       pled are true --

25               MR. BAER: Yes.

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1                   THE COURT: -- and we run through the timeline that  
2 you've just given me.

3                   MR. BAER: Yes.

4                   THE COURT: She has greater responsibilities than she  
5 had bargained for. She had a signed commitment letter. The  
6 commitment letter expires.

7                   She is asked to sign a renewal. She doesn't sign the  
8 renewal. She doesn't sign the renewal because she believes the  
9 terms of employment set forth in the document do not fairly  
10 reflect the compensation and remuneration that someone doing  
11 her job should get in the market. "I'm not signing that," she  
12 says to herself and to others.

13                  MR. BAER: Right.

14                  THE COURT: But she proceeds to continue as a good  
15 professional to do her job because Lehman's reorganization, in  
16 part, depends on that. She does her job, but she feels she's  
17 being unfairly treated. She may believe because she's doing a  
18 good job and had good performance reviews that she has a  
19 reasonable basis, not having signed the document, not that  
20 she's a lawyer, but she's been dealing with employment-related  
21 issues for most of her career, to at least put in a claim "for  
22 what I think I'm worth." How do I know based upon the  
23 complaint that that's not one reasonable way to read the  
24 complaint?

25                  We're back at the same point. You're arguing

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1 emphatically that I must find based upon this record, and there  
2 is no record except for the complaint and some documents  
3 attached to it, that she had no reasonable expectation. I have  
4 rather easily, I think, demonstrated that it's possible that  
5 she had such an expectation. You're still free to argue it's  
6 not reasonable.

7 MR. BAER: And indeed, Your Honor, that is the essence  
8 of my argument. I have no reason to doubt that Ms. Uvino had a  
9 hope, believed that she should have been paid more. I mean  
10 that's demonstrated by the record in this case. She, you know,  
11 way back when is --

12 THE COURT: So how do I determine reasonableness with  
13 respect to a cause of action for quantum meruit in a setting  
14 where there is no discovery? There are no smoking guns yet.  
15 There are no admissions against interest yet.

16 There's nothing that you can point to or that I can  
17 point to. Why should I grant this motion to dismiss as to this  
18 aspect of the complaint?

19 MR. BAER: Well, the --

20 THE COURT: I don't see it yet.

21 MR. BAER: The cases that I cite to Your Honor in  
22 connection with this matter relied on various factors to  
23 determine reasonableness. In one case, somebody was one of --  
24 the plaintiff was told, "I'm paying you too much. I'm not  
25 going to pay you X amount going forward."

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20                   And I understand, Your Honor, that you are -- you've  
21 characterized my argument as emphatic because I truly believe  
22 that there is no interpretation other than Ms. Uvino was being  
23 unreasonable if she actually believed -- and I doubt she did,  
24 quite frankly, as of December 2009, if she believed that she  
25 was going to get more money after that. She'd been asking for

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1 over a year. She provides data that says, "See, I'm entitled  
2 to more." They say --

3 THE COURT: You've just proven to me the opposite of  
4 the point you're trying to prove because you've demonstrated  
5 that one way to read the complaint is that the plaintiff  
6 believed that she was entitled to more compensation. And it  
7 wasn't simply a belief based upon a fanciful notion; it was  
8 based upon metrics. She had actually gone out and found  
9 comparables as to what this position should be worth on the  
10 market.

11 One could conclude, not necessarily conclusively  
12 conclude, that it would not be unreasonable for a human  
13 resources professional who has not signed a contract to believe  
14 that she might enjoy a claim under quantum meruit for what  
15 people who did this work in comparable settings might be paid  
16 greater than the amount offered. Now, that's not to say that  
17 she would win. That's not to say that following discovery this  
18 isn't a case acceptable to motion for summary judgment based  
19 upon established facts, but everything that you're presenting  
20 in this argument is hypothesis.

21 MR. BAER: Your Honor, what is not a hypothesis is  
22 that when she presented the metrics, they were rejected.

23 THE COURT: So what? Nothing was signed. We have an  
24 unreasonable employer and a reasonable employee. That's one  
25 possibility: an employer who was trying to save as much as

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1 possible on cost to the administration. That's a perfectly  
2 honorable goal for a reorganization such as this or any other  
3 reorganization. If you can get somebody to work for less that  
4 might be entitled to more, you've saved money.

5 MR. BAER: Your Honor --

6 THE COURT: But if that person leaves, well, I guess  
7 you have to replace that person or do without the spot.

8 MR. BAER: Right. Your Honor, respectfully, this  
9 motion, and I recognize that this is a motion to dismiss, is  
10 not about whether Ms. Uvino, whether there's an argument that  
11 could be made she's entitled to more money based upon the  
12 metrics and the value to the estate. I'm not attempting to go  
13 there. What --

14 THE COURT: This is about whether she has a reasonable  
15 basis to believe that she can get more money. I don't know  
16 how, which is my opening proposition, that can be conclusively  
17 determined on a motion to dismiss.

18 MR. BAER: Your Honor, when your -- when you  
19 repeatedly ask your boss, "I want more money," and your boss  
20 tells you, "I understand that. I'm not going to give you more  
21 money," to say that, notwithstanding, my boss' unequivocal  
22 remarks and unequivocal conclusion, and --

23 THE COURT: Tell me --

24 MR. BAER: -- a writing --

25 THE COURT: Tell me where in the record with respect

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1 to the unsigned commitment letter everything that you have just  
2 said was said can be found.

3 MR. BAER: Yes, Your Honor, it's all in the amended  
4 complaint. All right. As I said, in the allegations  
5 supporting the quantum meruit claim, Ms. Uvino, and it does  
6 begin around paragraph 14 of the amended complaint and run  
7 through paragraph 57, she details a course of history both  
8 under the renewal -- under the original commitment letter and  
9 the time leading up to the renewal commitment letter a desire  
10 to have increased compensation.

11 Indeed, she writes an e-mail that is attached to the  
12 amended complaint in March to Mr. Hershan setting forth all the  
13 reasons that she thinks she's entitled to more money, and what  
14 she gets back is -- what she -- what happens next is she has a  
15 meeting with Mr. Hershan in November. They go over the review.

16 He --

17 THE COURT: That's in the complaint?

18 MR. BAER: Yes, at paragraph 50.

19 THE COURT: What does it say?

20 MR. BAER: On November 30th, Hershan also reviewed  
21 with plaintiff the renewal terms of a second commitment period  
22 beyond December 31, 2009. So that clearly sets forth, Your  
23 Honor, that on November 30th plaintiff and Mr. Hershan  
24 discussed the terms of employment covering the January 1st  
25 period and prospectively after January 1st, so the time that

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1 would have been covered by the renewal commitment letter. As a  
2 follow on to that November 30th meeting, three days later on  
3 December 3rd Mr. Hershan hand delivers to plaintiff the renewal  
4 commitment letter, a copy of which is attached to the  
5 complaint, which sets forth the terms of employment going  
6 forward from January 1st prospectively.

7 There's no doubt what those terms are. They were  
8 discussed with her on November 30th. They were presented to  
9 her in writing on December 3rd.

10 THE COURT: We don't know what was discussed on  
11 November 30th. We only have a bald allegation of the most  
12 general nature. We don't know what she said to him or what he  
13 said to her.

14 MR. BAER: On -- I can only take the complaint as it  
15 comes, Your Honor. The allegations on their face say that they  
16 discussed the terms, the renewal terms, of a second commitment  
17 period. The very next sentence, "On December 30th, Hershan  
18 hand delivered to plaintiff a renewal commitment letter, a copy  
19 of which is attached as Exhibit G. The plaintiff did not sign  
20 the renewal commitment letter because she continued to disagree  
21 with the terms of the compensation." All right.

22 THE COURT: How does this lead to dismissal?

23 MR. BAER: Because --

24 THE COURT: I think there's a limit to how much time  
25 we should spend on this point. I have -- what I think you have

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1 already concluded is a fundamental disagreement with the  
2 conclusions that can be reasonably reached from the complaint  
3 on this critical element of quantum meruit. I don't think it's  
4 there on the motion to dismiss; I think as an intellectual  
5 matter it can't be done absent something more.

6 MR. BAER: Your Honor, I know it's improper for me to  
7 pose this question to the Court and I won't. But as a -- as  
8 you've put it, as a purely intellectual matter, at one -- at  
9 what point does it become unreasonable in the face of continued  
10 refusals both orally and in writing to give her any more money?  
11 At what point does it become unreasonable for Ms. Uvino to  
12 believe that she would get more money?

13 It just -- it seems to me --

14 THE COURT: After you take --

15 MR. BAER: -- we're well beyond that point.

16 THE COURT: After you take a bunch of depositions in  
17 this case, maybe you'll be able to prove that point. You can't  
18 prove it on a motion to dismiss to my satisfaction.

19 MR. BAER: Very good, Your Honor. I'd like to address  
20 the second point if I may.

21 THE COURT: Sure.

22 MR. BAER: Second point is for a breach of contract  
23 based upon the terms of the original commitment letter, and in  
24 particular the handwritten entry on the commitment letter  
25 during -- which sets forth in sum and substance that a review

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1 will be held by June 30th, and at that time the possibility of  
2 consideration of a potential increase in bonus potential --  
3 very conditional statement -- would be considered. As Your  
4 Honor pointed out in your decision in May, that statement does  
5 not include an enforceable promise to increase anyone's  
6 compensation; it merely sets forth a time by which a review  
7 would be conducted and a subject matter would be considered.  
8 It is black letter law that in order to have a claim for breach  
9 of contract, one must have damages and the damages must be  
10 beyond merely speculative.

11                   Here in response to our arguments and a case that's  
12 really on all fours where a plaintiff -- the Hudson case, where  
13 a plaintiff said, "Well, I didn't get my review after 90 days,  
14 and therefore I'm entitled to a breach of contract claim and  
15 I'm damaged thereby," the Court said, "Well, no, all you had  
16 was a definite promise for a review. You didn't have a  
17 definite promise for an increase in compensation. It's  
18 entirely too speculative to go there. No one can really tell  
19 whether or not you would get the increase, so I'm going to  
20 dismiss the cause of action as a matter of law."

21                   Here, first of all, the Hudson case is unaddressed and  
22 for that reason alone as a matter of law the claims should be  
23 dismissed. But secondly, the reasoning offered by plaintiff's  
24 counsel or plaintiff is that she has damages because she would  
25 have been looking for a job earlier, and she -- you know, but

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1 let's assume she would have gone out and searched for a job.  
2 We don't know what the timing of that would have been. We  
3 certainly don't know what -- when she would have received an  
4 offer. We certainly don't know what the terms of compensation  
5 would have been had she gone out and gotten another job. And  
6 indeed, she might be making more, in which case there would be  
7 no damage as a result.

8 So I mean we're really beyond the realm of speculation  
9 here, Your Honor, when it comes to this issue of whether or not  
10 Ms. Uvino would have had increased compensation as a result of  
11 a review being conducted on or about June 30th, 2009, and  
12 therefore I would ask that the Court dismiss that claim.

13 THE COURT: Okay. Mr. Rosen, let me hear from you.

14 MR. ROSEN: Thank you, Your Honor. Your Honor, first,  
15 by brief defense of myself on the first cause of action, I read  
16 your decision to say that I was only to amend the last cause of  
17 action, and that's the instruction I gave to my associate. So  
18 when they raised it -- because I deemed it the first cause of  
19 action amended by your decision, which is my -- because you  
20 hadn't allowed us to re-plea it -- that, we would not ever  
21 filed an amended pleading. It would have just been deemed  
22 amended by your decision. That was my read on it. If it  
23 caused confusion, that's why I immediately offered, stipulated  
24 to do it.

25 On the second issue, Your Honor, I'm not going to go

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1 there because you've gotten -- you've said everything that I  
2 was going to say in terms of the issue. The only other thing I  
3 would point out on that, that cause of action to dismiss the  
4 quantum meruit claim is the exact cause of action that you  
5 already ruled on and that motion should not even have been made  
6 again. They never appealed it: they never saw -- came back to  
7 you in any way; they just remade the exact same motion in front  
8 of you.

9 Going to the contract cause of action, and Your Honor,  
10 one of the things that counsel has done as a good lawyer,  
11 opposing counsel, is he's parsed things that shouldn't  
12 necessarily be parsed out. When that meeting took place and on  
13 the breach of contract when that meeting -- when the meeting  
14 took place, and they've acknowledged that the meeting did not  
15 take place until November 30th and the performance review was  
16 not given until December 2nd, my client was still under the --  
17 as she is today, under the position that under the contract  
18 that already passed that she had damages because they had  
19 breached their agreement and that she certainly wasn't going to  
20 sign a new contract that was going to let them off the hook on  
21 that.

22 And to reinforce that, the Court has to remember  
23 something very important: by not signing the renewal contract,  
24 she lost, and it's part of our damages which is where they're  
25 also wrong on the breach -- she lost \$50,000 dollars worth of

1 her bonus because there was a holdback on the bonus of 20%,  
2 which would be \$50,000 in this case, if you didn't sign the  
3 renewal contract. So she clearly had an expectation that she  
4 was entitled to more because, otherwise, if she thought she  
5 wasn't, she would have just signed it and then gotten another  
6 job. So, she had -- she most certainly had a higher  
7 expectation of that, and she wasn't going to waive any of her  
8 damages.

9 Let me address the Hudson case head on, all right,  
10 because, first of all, it's not a mandatory authority to you.  
11 Secondly, it's about a one or two line scribbled on this, and  
12 it contains additional elements that are not present here. It  
13 was an oral promise to give an increase and it was an oral  
14 promise to give a performance review, which never took place.

15 Here we have a written a contract with a written  
16 promise to conduct a performance review by a finite period of  
17 time which they clearly breached -- there is no -- there's no  
18 dispute over that -- by five months -- no, six months. I'm  
19 sorry, by six months. They breached that agreement, and it  
20 said that that review was specifically to consider an enhanced  
21 bonus.

22 And then what happens, that performance review  
23 actually takes place. Out of a scale of one to five, my client  
24 gets a one with a one being the highest for a review, and she  
25 gets no enhanced bonus whatsoever. She gets the same 10% that